Supreme Court, U.S.
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No. 15-866

IN THE

Supreme Court of the United States

STAR ATHLETICA, L.L.C., *Petitioner*,

v.

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION, AND VARSITY SPIRIT FASHIONS & SUPPLIES, INC., *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 5, 2016
CERTIORARI GRANTED MAY 2, 2016

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RELEVANT DOCKET ENTRIES

United States District Court
Western District of Tennessee
No. 2:10-cv-2508

Varsity Brands, Inc., et al.* v. *Star Athletica, LLC

Date Filed	No.	Docket Text
07/09/2010	1	COMPLAINT against Star Athletica, LLC, filed by Varsity Spirit Corporation, Varsity Brands, Inc., Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 drawing of uniform, # 2 picture of uniform (blue), # 3 "to be supplied", # 4 picture of uniform (red), # 5 drawing of uniform, # 6 picture of uniform (blue & white), # 7 drawing of uniform, # 8 pictures of uniforms, # 9 picture of uniform (bruins), # 10 picture of uniforms, # 11 mascots, # 12 colors and styles, # 13 team letters, # 14 lettering colors, # 15 certificate of registration dated 5-21-07, # 16 certificate of registration dated 5-12-2008, # 17 certificate of registration dated 4-29-2005, # 18 certificate of registration dated 4-29-2005, # 19 certifcate of registration dated 7-7-2008, # 20 Civil Cover Sheet, # 21 judge's card)(agj) (Entered:

		07/12/2010)
11/20/2010	34	MOTION to Dismiss by All Defendants. (Attachments: # 1 Memorandum, # 2 Affidavit, # 3 Exhibit Excerpt from Nimmer on Copyrights, # 4 Exhibit Policy Declaration, # 5 Exhibit Copyright Office Circular 40, # 6 Exhibit Copy of Complaint filed in Kohl's case)(Rafferty, Michael) (Entered: 11/20/2010)
12/29/2010	38	RESPONSE in Opposition re 34 MOTION to Dismiss filed by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Exhibit A-Unpublished Cases, # 2 Exhibit B- Compendium II of Copyright Office Practices, # 3 Exhibit C-US Copyright Letter Dated 10-19-07, # 4 Exhibit D-US Copyright Letter Dated 02-19-09, # 5 Exhibit E-US Copyright Letter Dated 02-19-09, # 6 Exhibit F-Line by Line Instructions of Copyright Office Form VA, # 7 Exhibit G-The Knitwaves "sweater designs")(Garrison, Grady) (Entered: 12/29/2010)
04/06/2016	51	AMENDED COMPLAINT *FIRST AMENDMENT TO COMPLAINT* against Star Athletica, LLC, filed by Varsity

		Spirit Corporation, Varsity Brands, Inc., Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Amended Exhibit 9, # 2 Amended Exhibit 19)(Baldridge, Adam) (Entered: 04/06/2011)
04/21/2011	56	ORDER denying 34 Motion to Dismiss. Signed by Judge Bernice B. Donald on 4/21/2011. (Donald, Bernice) (Entered: 04/21/2011)
05/05/2011	58	ANSWER to 51 Amended Complaint, 1 Complaint,,, , ANSWER to 51 Amended Complaint, 1 Complaint,,, with Jury Demand , COUNTER-CLAIM against All Defendants by All Defendants.(Rafferty, Michael) (Entered: 05/05/2011)
05/31/2011	61	MOTION to Dismiss *Defendant's Counterclaims* by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Memorandum in Support of Motion)(Baldridge, Adam) (Entered: 05/31/2011)
07/27/2011	71	RESPONSE in Opposition re 61 MOTION to Dismiss *Defendant's Counterclaims* filed by Star Athletica, LLC. (Attachments: # 1 Exhibit CO Letter Ruling Articles of Clothing, # 2 Exhibit

		Varsity Recon Letter, # 3 Exhibit Jovani and Kohls Cases, # 4 Exhibit Varsity Copyright Notices)(Crosby, Steven) (Entered: 07/27/2011)
08/16/2011	77	RESPONSE in Support re 61 MOTION to Dismiss *Defendant's Counterclaims* filed by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Baldridge, Adam) (Entered: 08/16/2011)
10/31/2011	80	ORDER granting in part and denying in part 61 Motion to Dismiss. Signed by Judge Bernice B. Donald on 10/31/11. (Donald, Bernice) (Entered: 10/31/2011)
02/28/2013	168	First SEALED MOTION *FOR SUMMARY JUDGMENT* by All Defendants. (Crosby, Steven) (Entered: 02/28/2013)
02/28/2013	169	First SEALED MOTION *FOR SUMMARY JUDGMENT* by All Defendants. (Attachments: # 1 Memorandum IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, # 2 Affidavit IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, # 3 Affidavit IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, # 4 Exhibit STATEMENT OF UNDIS-

		PUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT)(Crosby, Steven) (Entered: 02/28/2013)
02/28/2013	170	First SEALED MOTION *JOINT STATEMENT OF UNDISPUTED FACTS* by All Parties. (Crosby, Steven) (Entered: 02/28/2013)
04/02/2013	172	SEALED MOTION *for Summary Judgment* by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Memorandum in Support of Motion for Summary Judgment and Response in Opposition to Star's Motion for Summary Judgment, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4)(Baldridge, Adam) (Entered: 04/02/2013)
04/02/2013	173	Sealed Document */Statement of Undisputed Facts.* (Attachments: # 1 Exhibit a, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit L, # 12 Exhibit M) (Baldridge, Adam) (Entered: 04/03/2013)
04/03/2013	174	SEALED RESPONSE to Motion re 170 First SEALED MOTION

		JOINT STATEMENT OF UNDISPUTED FACTS /Varsity's Response to Star Athletica's Statement of Undisputed Facts for Motion for Summary Judgment filed by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9)(Baldridge, Adam) (Entered: 04/03/2013)
04/03/2013	175	Sealed Document */Notice of Errata for Corrected Exhibits to Varsity's Statement of Undisputed Facts (Dkt. No. 174).* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O) (Baldridge, Adam) (Entered: 04/03/2013)
05/07/2013	176	SEALED RESPONSE to Motion re 172 SEALED MOTION *for Summary Judgment* filed by All Defendants. (Attachments: # 1 Exhibit, # 2 Memorandum, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit,

		# 6 Exhibit)(Rafferty, Michael) (Entered: 05/07/2013)
05/24/2013	177	SEALED REPLY to Response to Motion re 176 Sealed Response to Motion *Plaintiffs' Sur-Reply in Support of Its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* filed by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Baldridge, Adam) (Entered: 05/24/2013)
05/24/2013	178	Sealed Document *Reply to Selected Responses of Star Athletica's Response to Varsity's Statement of Undisputed Facts for Motion for Summary Judgment.* (Baldridge, Adam) (Entered: 05/24/2013)
06/29/2013	181	RESPONSE in Opposition re 168 First SEALED MOTION *FOR SUMMARY JUDGMENT*, 172 SEALED MOTION *for Summary Judgment Obj'n to V's Sublimated Mtls* filed by All Defendants. (Attachments: # 1 Memorandum, # 2 Affidavit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit)

		(Rafferty, Michael) (Entered: 06/29/2013)
07/12/2013	182	Sealed Document */Plaintiffs' Opposition to Defendant's Objection to Varsity's Submission of Sublimated Materials in Connection with the Parties' Cross-Motions for Summary Judgment.* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Baldridge, Adam) (Entered: 07/12/2013)
07/24/2013	189	Sealed Document *Star's Reply to Varsity's Response to Objection to Submission of Sublimated Material (D.E. #181).* (Rafferty, Michael) (Entered: 07/24/2013)
03/01/2014	199	OPINION AND ORDER GRANTING IN PART AND DENYING IN PART 169 Defendant's Motion for Summary Judgment, DENYING 172 Plaintiff's Motion for Summary Judgment and DISMISSING WITHOUT PREJUDICE Plaintiff's State Law Claims. Signed by U.S. District Judge Robert H. Cleland on 3/1/2014. (lgw) (Entered: 03/01/2014)
03/01/2014	200	JUDGMENT in favor of Star Athletica, LLC against Varsity Brands, Inc., Varsity Spirit Corporation. Signed by U.S.

		District Judge Robert H. Cleland on 3/1/2014. (lgw) (Entered: 03/01/2014)
03/05/2014	201	NOTICE OF APPEAL as to 199 Order on Sealed Motion,,, 200 Judgment by Varsity Brands, Inc., Varsity Spirit Corporation, Varsity Spirit Fashions & Supplies, Inc.. Filing fee $ 505, receipt number 0651-1862386. Appeal Record due by 3/31/2014. (Baldridge, Adam) (Entered: 03/05/2014)
03/06/2014	202	USCA Case Number 14-5237 for 201 Notice of Appeal, filed by Varsity Spirit Corporation, Varsity Brands, Inc., Varsity Spirit Fashions & Supplies, Inc.. (jae) Modified on 3/11/2014 to correct appeal case number(jae). (Entered: 03/06/2014)
07/08/2014	213	NOTICE by Star Athletica, LLC *of Filing of Exhibits to SJ Motion* (Attachments: # 1 Exhibit)(Rafferty, Michael) (Entered: 07/08/2014)

Relevant Docket Entries
United States Court of Appeals
for the Sixth Circuit
No. 14-5237

03/06/2014	1	Civil Case Docketed. Notice filed by Appellants Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc.. Transcript needed: n. (RLJ)
03/17/2014	10	CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by Attorney Mr. Bradley E. Trammell for Appellants Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc.. Certificate of Service:03/17/2014. (BET)
06/23/2014	24	APPELLANT BRIEF filed by Mr. Adam Stephen Baldridge for Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc.. Certificate of Service:06/23/2014. Argument Request: requested. (unsealed via court order dated 12/01/14)--[Edited 12/01/2014 by RLJ] (ASB)
06/23/2014	26	APPENDIX filed by Mr. Adam Stephen Baldridge for Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit

		Fashions & Supplies, Inc.. Volume: 1; Pages: App. 1 App. 30. Certificate of Service: 06/23/2014. (ASB)
12/01/2014	31	ORDER filed DENYING motion to seal brief [27] filed by Mr. Adam Stephen Baldridge. Entered by order of the court.--[Edited 12/01/2014 by RLJ] (RLJ)
01/07/2015	36	CORRECTED Appellee's Brief BRIEF filed by Mr. Michael Francis Rafferty for Star Athletica, LLC. Certificate of Service:01/07/2015. Argument Request: requested. (MFR)
01/07/2015	37	APPENDIX filed by Mr. Michael Francis Rafferty for Star Athletica, LLC. Volume: 2; Pages: App. 31 App. 96. Certificate of Service: 01/07/2015. (MFR)
01/26/2015	42	REPLY BRIEF filed by Attorney Mr. Adam Stephen Baldridge for Appellants Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc.. Certificate of Service: 01/26/2015. (ASB)
04/06/2015	47	ORDER filed: the district court is requested to forward to the clerk of this court the following: (1) Exhibit A to the Declaration of Gary Spencer (RE 173-1, Page ID 2409-2435) (Sublimated

		cheerleading uniforms bearing designs 0815, 078, 074, 299A and 299B); (2) Exhibit B to the Declaration of Gary Spencer (Fabric displaying sublimated designs before being cut out and sewn); (3) Exhibit C to the Declaration of Gary Spencer (Blank silhouette garments); and (4) Exhibit D to the Declaration of Gary Spencer (Warmups and Jackets). Upon receipt, the exibits will be retained in the clerk's office of this court pending the appellate proceedings and returned to the distrct [sic] court at the conclusion of the appeal. (RLJ)
04/08/2015	48	CERTIFIED RECORD filed. Volumes include: Ex: 2 boxes of cheer uniforms; (MRH)
04/13/2015	50	NOTIFICATION filed by Mr. Michael Francis Rafferty for Star Athletica, LLC regarding Appellee's Designation of Physical and Non-Electronic Exhibits under Rule 10(b)(2). Certificate of Service: 04/13/2015. (MFR)
04/14/2015	51	ORDER filed In view of the defendant-appellee's designation pursuant to Sixth Circuit Rule 10(b)(2) advising of additional physical exhibits that it wishes to have transmitted to the court

		of appeals, The parties are advised that all physical exhibits have been forwarded to this court. (RGF)
04/24/2015	53	CAUSE ARGUED by Mr. Grady M. Garrison for Appellants Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc. and Mr. Michael Francis Rafferty for Appellee Star Athletica, LLC before Guy, Moore, and McKeague, Circuit Judges. (DTS)
08/19/2015	58	OPINION and JUDGMENT filed The district court's judgment in favor of Star Athletica in the matter of Varsity's designs being copyrightable and its order dismissing Varsity's state-law claims are VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court. Decision for publication. Ralph B. Guy, Jr., Karen Nelson Moore (AUTHORING), and David W. McKeague (DISSENTING), Circuit Judges. (CL)
09/16/2015	64	PETITION for en banc rehearing filed by Mr. John J. Bursch for Star Athletica, LLC. Certificate of Service: 09/16/2015. (JJB)
10/07/2015	65	ORDER filed denying petition

		for en banc rehearing [64] filed by Mr. John J. Bursch. Ralph B. Guy , Jr., Karen Nelson Moore, and David W. McKeague, Circuit Judges. (BLH)
10/14/2015	66	MOTION filed by Mr. Matthew T Nelson for Star Athletica, LLC to stay mandate. Certificate of Service: 10/14/2015. (MTN)
10/30/2015	67	ORDER filed GRANTING motion to stay mandate pending the timely filing of a petition for certiorari [66] filed by Mr. Matthew T Nelson.. Ralph B. Guy , Jr., Karen Nelson Moore, and David W. McKeague, Circuit Judges. (RLJ)
01/08/2016	69	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Star Athletica, LLC. Supreme Court Case No:15-866, 01/05/2016. (CL)
05/03/2016	70	U.S. Supreme Court letter filed The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. [69] filed by Star Athletica, LLC.. Supreme Court Case No: 15-866, 05/02/2016.. (CL)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE, WESTERN DIVISION

VARSITY BRANDS, INC.,)
VARSITY SPIRIT CORPORA-) No.: _____
TION, AND VARSITY SPIRIT)
FASHIONS & SUPPLIES, INC.,)
Plaintiffs.)

v.

STAR ATHLETICA, L.L.C.,
Defendant.

COMPLAINT

Plaintiffs Varsity Brands, Inc., Varsity Spirit Fashions and Supplies, Inc. and Varsity Spirit Corporation by and through their undersigned attorneys, for their complaint against Defendant Star Athletica, L.L.C., hereby allege as follows:

NATURE OF THE ACTION

1. This is a civil action for copyright infringement arising under the copyright laws of the United States, 17 U.S.C. § 101 et seq., as amended (the "Copyright Act"), violations of the Lanham Act, 15 U.S.C. § 1125(a), and unfair competition, inducing breach of contract, inducing breach of fiduciary duty and civil conspiracy arising under state law.

PARTIES

2. Plaintiff Varsity Brands, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 6745

Lenox Center Court, Suite 300, Memphis, Tennessee 38115.

3. Plaintiff Varsity Spirit Corporation. is a corporation organized and existing under the laws of the State of Tennessee with its principal place of business at 6745 Lenox Center Court, Suite 300, Memphis, Tennessee 38115.

4. Plaintiff Varsity Spirit Fashions & Supplies, Inc. is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at 6745 Lenox Center Court, Suite 300, Memphis, Tennessee 38115. Plaintiffs Varsity Brands, Inc., Varsity Spirit Fashions and Supplies, Inc. and Varsity Spirit Corporation are hereinafter referred to collectively as "Varsity."

5. Upon information and belief, Defendant Star Athletica, L.L.C., is a limited liability company organized and existing under the laws of the State of Missouri, with its principal place of business at: 582 Goddard Avenue, Chesterfield, Missouri 63005 and is doing business and committing tortious acts within this District.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1338(a) and (b).

7. Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(b) and (c) and 1440(a).

FACTUAL BACKGROUND

Varsity's Original Designs and Catalogs

8. Varsity is and for many years has been among the most successful and highly respected companies in the United States engaged in the business

of designing, manufacturing and selling high-quality apparel and accessories for use in cheerleading and related activities.

9. Varsity's success is due in no small measure to its employment, at great cost to Varsity, of highly talented individuals who create for Varsity original and attractive two-dimensional designs ("Varsity Designs") that are reproduced and/or applied to Varsity apparel and accessories, in a continuing effort to appeal to existing and potential customers in the highly competitive cheerleading apparel and accessories business.

10. The Varsity Designs are created as works made for hire by Varsity's employees, and constitute copyrightable subject matter under the Copyright Act.

11. Varsity owns all right, title and interest in and to the Varsity Designs.

12. Each year, Varsity produces, at great expense, using models, photographers and graphic designers, original full-color catalogs showing Varsity apparel and accessories (the "Varsity Catalogs") and distributes copies of such Varsity Catalogs to its customers and potential customers in the highly competitive cheerleading apparel and accessories business.

Defendant's Copyright-Infringing Activities

13. Defendant offers its apparel for sale through catalogs, which are accessible via its website and, upon information and belief, the mail and its sales representatives, or and are distributed in interstate commerce.

14. Defendant, without permission, license or consent from Varsity, has copied a significant number of Varsity Designs. The Varsity Designs at issue, and the unauthorized copies appearing in Defendant's current catalogs and/or online, include the following:

(a) Varsity Design 078 and Defendant's Design C, appearing at page 23 of its catalog (copies attached hereto respectively as Exhibits 1 and 2).

(b) Varsity Design 0815 and Defendant's Design B, appearing at page 18 of its catalog (copies attached hereto respectively as Exhibits 3 and 4).

(c) Varsity Design 299B and Defendant's Design B, appearing at page 15 of its catalog (copies attached hereto respectively as Exhibits 5 and 6).

(d) Varsity Design 299A and Defendant's Design D, appearing at page 25 of its catalog (copies attached hereto respectively as Exhibits 7 and 8).

(e) Varsity Design 034 and Defendant's Design B, appearing at page 4 of its catalog (copies attached hereto respectively as Exhibits 9 and 10).

15. Defendant's infringing designs may be found on its website accessed at www.starathletica.com.

Defendant's Other Tortious Activities

16. In retaliation for Varsity's prospective and eventual termination of a supply agreement between Varsity and R. J. Liebe Athletic Lettering Company, Defendant established its business to compete against Varsity in the sale of cheerleading uniforms and related accessories. Defendant acted through Robert J. Liebe, who is both Chief Manager of Defendant and President of R. J. Liebe Athletic Lettering

Company, whose principal place of business is the same as that of Defendant.

17. In connection with such retaliation, Defendant, again acting through Robert J. Liebe, induced existing and former employees of Varsity headquartered in Memphis, Tennessee, to assist Defendant in manufacturing or procuring the manufacture of cheerleading uniforms and related accessories and in the sales thereof, and in doing so caused such employees to breach their fiduciary duties owed to, and their in-term and post-term noncompetition agreements with, Varsity

18. More particularly, Defendant, acting independently or in a conspiracy with others, induced Rebecca Cook, a Varsity ex-employee under a noncompetition agreement with Varsity, to solicit Varsity customers to purchase cheerleading uniforms from Defendant.

19. More particularly, upon information and belief, Defendant induced Kerry Leake, while an employee of Varsity and thereafter as an ex-employee under a non-competition agreement with Varsity, to steal away from Varsity from its server and files in Memphis, Tennessee, electronic files used to create outline mascot letterings and monogramming. Leake had direct access to these files while employed at Varsity and may have obtained them during and following termination of his employment from Varsity's garment manufacturers with which he dealt in the course of his employment with Varsity. Defendant used these electronic files of Varsity as its own outline mascot letterings and monogramming, thereby infringing Varsity's rights.

20. A review of Defendant's website further reveals that Defendant selected naming conventions for its outline mascots that are deceptively similar to Varsity's naming conventions, e.g., ECM-1 of Varsity becomes Defendant's EOM-1, Varsity's ECM-2 become's [sic] Defendant's EOM-2, etc. Defendant even omits numbers from its numbering sequence for the purpose of copying Varsity's naming conventions closely, e.g., Defendant's naming conventions jump from EOM-17 to EOM-20, so that Defendant's EOM-20 may mimic Varsity's ECM-20. Further, some of Defendant's online mascots, e.g., EOM-41, are not displayed in Varsity's publicly-available catalog, but are contained in Varsity's internal files to which Mr. Leake had access. Varsity's naming conventions are attached hereto as Exhibit 11. Defendant's naming conventions are attached hereto as Exhibit 12.

21. On information and belief, Defendant, without permission from Varsity, obtained from R. J. Liebe Athletic Lettering Company, some 80,000 electronic tackle twill files owned by Varsity and which Varsity had supplied to R. J. Liebe Athletic Lettering Company from Memphis.

22. Defendant selected style codes for its tackle twill offerings that are identical or deceptively similar to Varsity's style codes, e.g., Defendant's TTCRAZ, TTPAW, TTMEG and TTCHV are identical to Varsity's style codes and the great majority of the remainder are deceptively similar to those of Varsity. Varsity's style codes are attached hereto as Exhibit 13. Defendant's style codes are attached hereto as Exhibit 14.

23. More particularly, on information and belief, Defendant induced Leake to provide access to Varsity's proprietary uniform patterns and other

valuable information in preparation for competition with Varsity

24. On information and belief, Defendant has independently or through Mr. Leake induced one or more of Varsity's uniform manufacturers to manufacture cheerleading uniforms for Defendant in violation of Varsity's contracts with such manufacturers.

25. On March 4, 2010, Varsity, through its counsel, sent a letter to Defendant demanding that it cease its tortious activities.

26. On March 8, 2010, Defendant through its counsel denied the demands of Varsity.

FIRST CLAIM FOR RELIEF
(Copyright Infringement)

27. Varsity repeats and realleges the assertions contained in paragraphs 1 through 26 above.

28. Design 078 is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-417-427, with an effective date of May 21, 2007 A copy of the Certificate of Registration is attached hereto as Exhibit 15 (the deposit material appears in Exhibit 1).

29. Defendants, without authorization from Varsity, are selling distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 078.

30. Defendants have thereby infringed Varsity's copyright in Design 078.

31. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 078 under the Federal Copyright Act.

32. Upon information and belief, by the acts complained of, Defendants have made substantial profits and gains which they are not in law or in equity entitled to retain.

33. The aforementioned acts by Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

SECOND CLAIM FOR RELIEF
(Copyright Infringement)

34. Varsity repeals [sic] and realleges the assertions contained in paragraphs 1 through 33 above.

35. Design 0815 is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-675-905, with an effective date of May 12, 2008. A copy of the Certificate of Registration is attached hereto as Exhibit 16.

36. Defendants, without authorization from Varsity, are selling distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 0815.

37. Defendants have thereby infringed Varsity's copyright in Design 0815.

38. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 0815 under the Federal Copyright Act.

39. Upon information and belief, by the acts complained of, Defendants have made substantial profits and gains which they are not in law or in equity entitled to retain.

40. The aforementioned acts by Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

THIRD CLAIM FOR RELIEF
(Copyright Infringement)

Varsity repeals [sic] and realleges the assertions contained in paragraphs 1 through 40 above.

41. Design 299A is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-319-228, with an effective date of April 29, 2005. A copy of the Certificate of Registration is attached hereto as Exhibit 17 (the deposit material appears in Exhibit 5).

42. Defendants, without authorization from Varsity, are selling distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 299A.

43. Defendants have thereby infringed Varsity's copyright in Design 299A.

44. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 299A under the Federal Copyright Act.

45. Upon information and belief, by the acts complained of, Defendants have made substantial profits and gains which they are not in law or in equity entitled to retain.

46. The aforementioned acts by Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law

FOURTH CLAIM FOR RELIEF
(Copyright Infringement)

47. Varsity repeals [sic] and realleges the assertions contained in paragraphs 1 through 46 above.

48. Design 299B is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-319-226, with an effective date of April 29, 2005. A copy of the Certificate of Registration is attached hereto as Exhibit 18 (the deposit material appears in Exhibit 7).

49. Defendants, without authorization from Varsity, are selling distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 299B.

50. Defendants have thereby infringed Varsity's copyright in Design 299B.

51. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 299B under the Federal Copyright Act.

52. Upon information and belief, by the acts complained of, Defendants have made substantial profits and gains which they are not in law or in equity entitled to retain.

53. The aforementioned acts by Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

FIFTH CLAIM FOR RELIEF
(Copyright Infringement)

54. Varsity repeals [sic] and realleges the assertions contained in paragraphs 1 through 53 above.

55. Design 034 is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-712-130, with an effective date of July 7, 2008. A copy of the Certificate of Registration is attached hereto as Exhibit 19 (the deposit material is Exhibit 9).

56. Defendants, without authorization from Varsity, are selling, distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 034.

57. Defendants have thereby infringed Varsity's copyright in Design 034.

58. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 034 under the Federal Copyright Act.

59. Upon information and belief, by the acts complained of, Defendants have made substantial profits and gains which they are not in law or in equity entitled to retain.

60. The aforementioned acts by Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

SIXTH CLAIM FOR RELIEF
(Unfair Competition)

61. Varsity repeats and realleges the assertions contained in paragraphs 1 through 60 above.

62. The aforementioned acts of Defendant constitute unfair competition, unlawful under the laws of the State of Tennessee.

63. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

64. The aforementioned acts of Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

SEVENTH CLAIM FOR RELIEF
(Inducing Breach of Contract - Statutory)

65. Varsity repeats and realleges the assertions contained in paragraphs 1 through 64 above.

66. Defendant has willfully induced one or more third parties to breach their contracts with Varsity.

67. The above actions of Defendant constitute violations of Tenn. Code Ann.§ 47-50-109.

68. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

69. The aforementioned acts of Defendant have damaged, and continue to damage Varsity.

70. Varsity is entitled to treble damages pursuant to Tenn. Code Ann. § 47-50-109.

EIGHTH CLAIM FOR RELIEF
(Inducing Breach of Contract - Common Law)

71. Varsity repeats and realleges the assertions contained in paragraphs 1 through 70 above.

72. Defendant's actions constitute inducing the breach of contract in violation of the common law of the State of Tennessee.

73. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

74. The aforementioned acts of Defendant have damaged and continue to damage Varsity.

75. Varsity is entitled to recover punitive damages.

NINTH CLAIM FOR RELIEF
(Inducing Breach of Fiduciary Duty)

76. Varsity repeats and realleges the assertions contained in paragraphs 1 through 75 above.

77. By the above actions Defendant has induced employees of Varsity to breach their fiduciary duties owed to Varsity

78. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

79. The aforementioned acts of Defendant have damaged and continue to damage Varsity.

TENTH CLAIM FOR RELIEF
(Violation of Lanham Act)

80. Varsity repeats and realleges the assertions contained in paragraphs 1 through 79 above.

81. Defendant has in connection with its goods used false designations of origin and made false and misleading misrepresentations of fact.

82. The above designations of origin and misrepresentations of fact are likely to cause confusion, or to cause mistake, or to deceive the purchasing public

with respect to the origin, sponsorship or approval of Defendant's goods.

83. The above actions of Defendant constitute violations of 15 U.S.C. § 1125(a).

84. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

85. The aforementioned acts of Defendant have damaged, and if not enjoined, will continue to damage Varsity and cause it irreparable harm, for which Varsity has no adequate remedy at law.

ELEVENTH CLAIM FOR RELIEF
(Civil Conspiracy)

86. Varsity repeats and realleges the assertions contained in paragraphs 1 through 85 above.

87. Defendant has in concert and in conspiracy with one or more former employees of Varsity and third parties engaged in lawful acts to achieve an unlawful purpose, or alternatively, has engaged in unlawful acts to achieve a lawful purpose.

88. The above actions of Defendant constitute a civil conspiracy unlawful under the laws of the state of Tennessee.

89. Upon information and belief, by the acts complained of, Defendant has made substantial profits and gains, which it is not in law or in equity entitled to retain.

90. The aforementioned acts of Defendant have damaged and continue to damage Varsity.

PRAYER FOR RELIEF

WHEREFORE, Varsity respectfully requests that the Court:

1. Enter judgment that Defendants have infringed upon Varsity's copyright in the Varsity Designs.

2. Preliminarily and permanently enjoin Defendants, their officers, directors, agents, partners, employees and related companies, and all persons acting for, with, by. through or under them, from manufacturing, copying, reproducing, distributing, advertising, promoting, offering for sale or selling any product or articles bearing any design identical or substantially similar to any of the Varsity Designs;

3. Order the impoundment of the infringing goods pursuant to 17 U.S.C. § 503;

4. Order the Defendants, their officers, directors, agents, partners, employees and related companies, and all persons acting for, with, by, through, or under them, to destroy all products or articles infringing the copyrights in the Varsity Designs, as well as all other infringing materials;

5. (a) Award to Varsity its actual damages incurred as a result of Defendant's acts of copyright infringement, and all profits Defendants realized as a result of their acts of copyright infringement, in amounts to be determined at trial; or (b) in the alternative, award to Varsity, pursuant to 17 U.S.C. § 504, statutory damages;

6. Award to Varsity, pursuant to 17 U.S.C. § 505, its costs and attorneys' fees incurred as a result of Defendants' acts of copyright infringement.

7. Preliminarily and permanently enjoin Defendant, its members, officers, directors, agents, partners, employees and related companies, and all persons acting for, with, by, through or under them, from manufacturing, copying, reproducing, distributing, advertising, promoting, offering for sale or selling any products or articles containing (a) outline mascots whose naming conventions and/or (b) tackle twill whose style codes are identical or substantially similar to Varsity's naming conventions and/or style codes;

8. Order the Defendant, its members, officers, directors, agents, partners, employees and related companies, and all persons acting for, with, by, through, or under them, to destroy all catalogues, promotional literature and brochures containing, and remove from all its websites displaying, such naming conventions and/or style codes.;

9. Award to Varsity its actual damages incurred and all profits realized by Defendant as a result of its acts of unfair competition, inducing breach of contract, inducing breach of fiduciary duty, and civil conspiracy;

10. Award to Varsity treble the amount of its damages sustained as result of Defendant's violations of Tenn. Code Ann. § 47-50-109;

11 Award to Varsity punitive damages as a result of Defendant's acts of unfair competition and inducing breach of contract in violation of the common law of Tennessee;

12. Pursuant to 15 U.S.C. § 1117(a), award to Varsity Defendant's profits, and any damages sustained by Varsity as a result of Defendant's viola-

tions of 15 U.S.C. § 1125(a) together with the costs of this action;

13. Award Varsity treble the amount of its actual damages sustained by virtue of Defendant's violations of 15 U.S.C. § 1125(a).

14. Declare this to be an exceptional case and award Varsity its reasonable attorney's fees pursuant to 15 U.S.C. § 1117(a); and

15. Award to Varsity such other and further relief as the Court deems just and proper.

Dated this 9th day of July, 2010.

Respectfully submitted,

s/ Grady M. Garrison

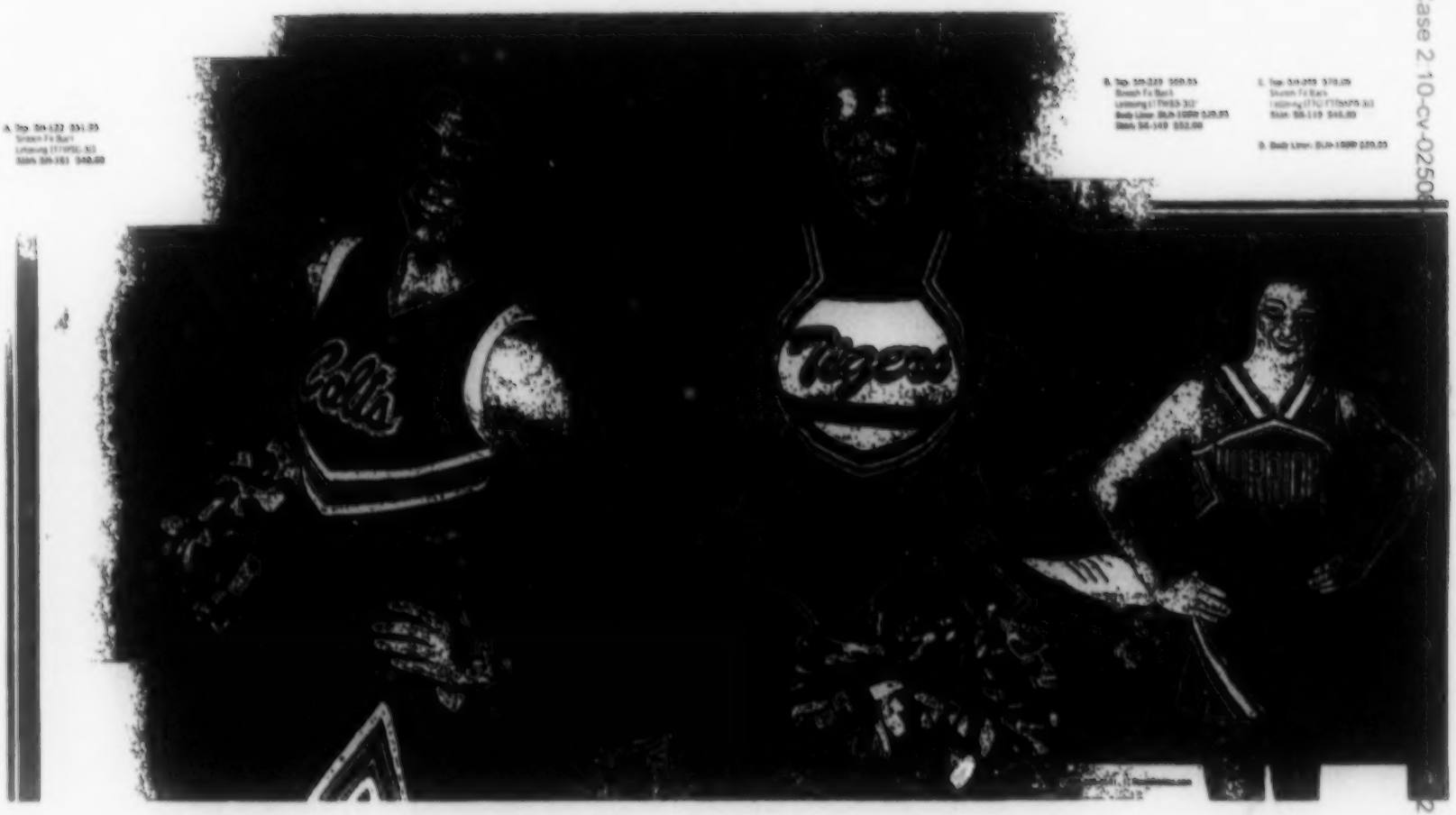
Grady M. Garrison (#008097)
Adam S. Baldridge (#023488)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
165 Madison Avenue, Suite 2000
Memphis, TN 38103
Telephone: (901) 526-2000
Facsimile: (901) 577-0814
Email: ggarrison@bakerdonelson.com
Email: abaldridge@bakerdonelson.com

Attorneys for Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Spirit Fashions & Supplies, Inc.

EXHIBIT 1

078

EXHIBIT 2



Case 2:10-cv-02506

EXHIBIT 4

Case 2:10-cv-02508-BBD-cgc Document 1-4 Filed 07/09/10 Page 2 of 2

EXHIBIT 6

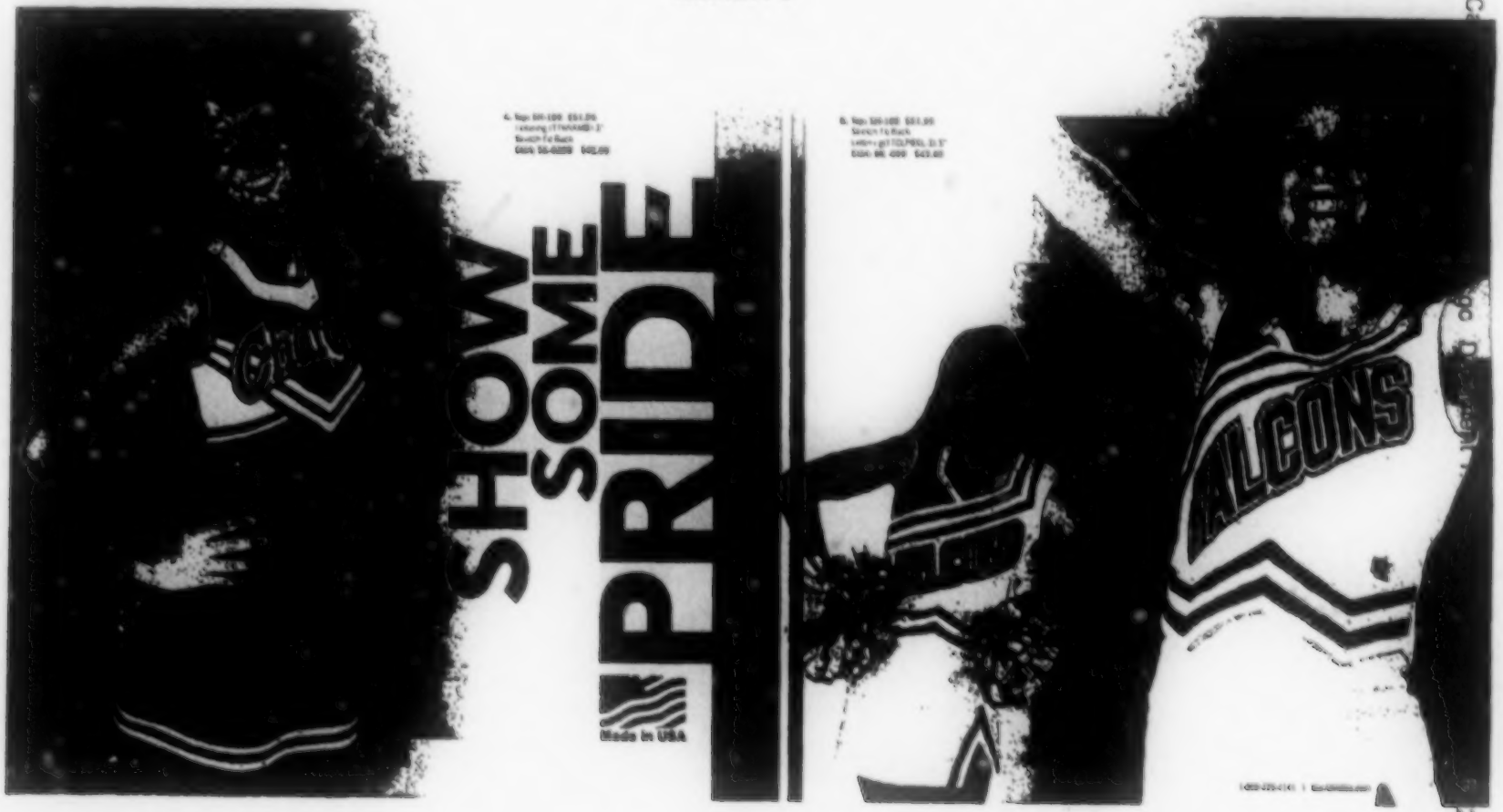


EXHIBIT 8

EXHIBIT 10

Case 2:10-cv-02508-BBD-cgc Document 1-10 Filed 07/09/10 Page 2

EXHIBIT 15

Certificate of Registration
Additional certificate
(17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA

For a Work of the Visual Arts

UNITED STATES COPYRIGHT OFFICE

RE VA 1-417-427

EFFECTIVE DATE OF REGISTRATION

5 21 07
Month Day Year

Maria A. Pallante

Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

1 Title of This Work
Design Number 078

NATURE OF THIS WORK See instructions
2-dimensional artwork

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work**

If published in a periodical or serial give:
Volume Number Issue Date On Pages

2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
Varsity Brands, Inc.

DATES OF BIRTH AND DEATH
Year Born Year Died

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in United States

Was this Author's Contribution to the Work
Anonymous? ☐ **Yes** ☒ **No**
Pseudonymous? ☐ **Yes** ☒ **No**

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3-Dimensional sculpture
☒ 2-Dimensional artwork

☐ Reproduction of work of art
☐ Map
☐ Photograph
☐ Jewelry design
☐ Technical drawing
☐ Text
☐ Architectural work

---

b **Name of Author**

_____

Dates of Birth and Death
Year Born _____ Year Died _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in _____

Was this Author's Contribution to the Work
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es)
See Instructions
☐ 3-Dimensional sculpture
☐ 2-Dimensional artwork
☐ Reproduction of work of art
☐ Map
☐ Photograph

☐ Jewelry design
☐ Technical drawing
☐ Text
☐ Architectural work

---

3 a **Year in Which Creation of This Work Was Completed** 2006 Year

This information must be given in all cases.

b **Date and Nation of First Publication of This Particular Work**

Complete this information ONLY if this work has been published. Month January Day 29 Year 2007 United States Nation

---

4 See instructions before completing this space **COPYRIGHT CLAIMANT(S)** Name and address must be given even if the claimant is the same as the author given in space 2.

Varsity Brands, Inc.
6745 Lenox Center Court
Memphis, TN 38115

Transfer if the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

DO NOT WRITE HERE
OFFICE USE ONLY

APPLICATION RECEIVED
MAY 21 2007

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED
MAY 21 2007
FUNDS RECEIVED

MORE ON BACK

- Complete all applicable spaces (numbers 5-9) on the reverse side of this page
- See detailed instructions.
- Sign the form at line 8.

DO NOT WRITE HERE

Page 1 of 2 pages

EXAMINED BY _____ FORM VA
CHECKED BY _____ FOR COPYRIGHT
CORRESPONDENCE OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

5 **PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ **Yes** ☒ **No** if your answer is "Yes," why is another registration being sought? (Check appropriate box.)

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: **Previous Registration Number** **Year of Registration**

---

6 See instructions before completing this space.

DERIVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.

a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates.

b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

---

7 **DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of account.

a. **Name** **Account Number**

---

b. **CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP

Cowan, Liebowitz & Latman P.C.,
Attn. Thomas Kjellberg
1133 Avenue of the Americas
New York, NY 10036-6799
Area code and daytime phone number (212) 790-9202
Fax number (212) 575-0671
Email txk@cll.com

---

8 **CERTIFICATION*** I the undersigned hereby certify that I am the

Check only one

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☒ authorized agent of Varsity Brands, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date. If this application gives a date of publication in space 3, do not sign and submit it before that date.

Thomas Kjellberg Date 5/18/07

Handwritten signature (X)

X_____

---

9 **Certificate will be mailed in window envelope to this address**

Name

Cowan, Liebowitz & Latman, P.C. /Attn. Thomas Kjellberg

Number/Street/Apt

---

* **17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.**

1133 Avenue of the Americas
City/State/ZIP
New York New York 10036-6799

YOU MUST

- Complete all necessary spaces
- Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE

1. Application form
2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

MAIL TO

Library of Congress
Copyright Office
101 Independence Avenue S.E.
Washington, D.C. 20559-6000

Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000

Rev: August 2003–30,000 Web Rev: June 2002
Printed on recycled paper

U.S. Government Printing Office: 2003–496-605/60,029

EXHIBIT 16

Certificate of Registration
Additional certificate (17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Registration Number:
VA 1-675-905

Effective date of registration:
May 12, 2008

Maria A. Pallante
Acting Register of Copyrights, United States of America

Title _____

Title of Work: 0815
Nature of Work: 2-dimensional artwork

Completion/Publication _____

Year of Completion: 2007
Date of 1st Publication: January 2, 2008
Nation of 1st Publication: United States

Author _____

Author: Varsity Brands, Inc.
Author Created: 2-dimensional artwork
Work made for hire: Yes
Domiciled in: United States
Anonymous: No
Pseudonymous: No

Copyright claimant _____

Copyright Claimant: Varsity Brands, Inc.

6745 Lenox Center Court, Memphis, TN, 38115

Limitation of copyright claim _____

Previously registered: No

Certification _____

Name: Thomas Kjellberg

Date: May 9, 2008

Registration #: VA0001675905

Service Request #: 1-68419011

Cowan, Liebowitz & Latman, P.C.
Thomas Kjellberg
1133 Avenue of the Americas
New York, NY 10036-6799

EXHIBIT 17

Certificate of Registration
Additional certificate (17 U.S.C. 706)
[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE
RE VA 1-319-228
EFFECTIVE DATE OF REGISTRATION
April 29 2005
Month Day Year

Maria A. Pallante
Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

1 Title of This Work

299A

NATURE OF THIS WORK See instructions

FABRIC DESIGN (ARTWORK)

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. **Title of Collective Work**

If published in a periodical or serial give:
Volume Number Issue Date On Pages

2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer not the employee (see instructions) For any part of this work that was *made for hire* check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
VARSITY SPIRIT FASHIONS & SUPPLIES INC

DATES OF BIRTH AND DEATH
Year Born Year Died

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in United States

Was this Author's Contribution to the Work
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

☒ 2 Dimensional artwork

☐ Reproduction of work of art

☐ Map

☐ Photograph

☐ Jewelry design

☐ Technical drawing

☐ Text

☐ Architectural work

b **Name of Author**

_____

Dates of Birth and Death
Year Born Year Died

_____ _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled at _____

Was this Author's Contribution to the Work

Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

☐ 2 Dimensional artwork

☐ Reproduction of work of art

☐ Map

☐ Photograph

☐ Jewelry design

☐ Technical drawing

☐ Text

☐ Architectural work

---

3 a **Year in Which Creation of This Work Was Completed** 1998 Year

This information must be given in all cases.

b **Date and Nation of First Publication of This Particular Work Complete this information ONLY if this work has been published.**

Month January Day _____ Year 1999
USA _____ Nation

---

4 See instructions before completing this space.

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2.

VARSITY SPIRIT FASHIONS & SUPPLIES INC
6745 LENOX CENTER COURT
MEMPHIS, TN 38115

Transfer If the claimant(s) named here in space 4 is (are) different from the author(s) named in space

2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

DO NOT WRITE HERE
OFFICE USE ONLY

APPLICATION RECEIVED
APR 29 2005

ONE DEPOSIT RECEIVED
APR 29 2005

TWO DEPOSITS RECEIVED

_____

FUNDS RECEIVED

_____

MORE ON BACK

- Complete all applicable spaces (numbers 5-9) on the reverse side of this page.
- See detailed instructions.
- Sign the form at line 8.

DO NOT WRITE HERE
Page 1 of 2 pages

EXAMINED BY
CHECKED BY
CORRESPONDENCE

FORM VA
FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

5 **PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ **Yes** ☒ **No** If your answer is "Yes," why is another registration being sought? (Check appropriate box.)

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give **Previous Registration Number** **Year of Registration**

6 **DERIVATIVE WORK OR COMPILATION** Complete both space 6a and 6b for a derivative work; completely only 6b for a compilation.

a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates.

N/A

b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

N/A

---

7 **DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

a. **Name** **Account Number**

---

b. **CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP

Arlana S. Cohen Esq
Cowan Liebowitz & Latman PC
1133 Avenue of the Americas New York NY 10036
6799

Area code and daytime phone number (212) 790-9200
Fax number (212) 575-0671
Email asc@cll.com

---

8 **CERTIFICATION*** I, the undersigned, hereby certify that I am the

check only one

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☒ authorized agent of VARSITY SPIRIT FASHIONS & SUPPLIES INC.

Name of author or other copyright claimant, or owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date. If this application gives a date of publication in space 3, do not sign and submit it before that date.

Arlana S. Cohen Esq. **Date** 4/28/05

Handwritten signature (X)

X_____

_____

9 **Certificate will be mailed in window envelope to this address:**

_____

* **17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.**

Name

Arlana S Cohen Esq
Number/Street/Apt
1133 Avenue of the Americas
City/State/ZIP
New York New York 10036
YOU MUST

- Complete all necessary spaces
- Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE

1. Application form

2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*

3. Deposit material

MAIL TO

Library of Congress
Copyright Office
101 Independence Avenue S.E.
Washington, DC 20559-6000

Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000

Rev: August 2003–30,000 Web Rev: June 2002
Printed on recycled paper

U.S. Government Printing Office: 2003–496-605/ 60,029

EXHIBIT 18

Certificate of Registration
Additional certificate (17 U.S.C. 706)

[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form VA
For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

RE VA 1-319-226
EFFECTIVE DATE OF REGISTRATION
Month Day Year
April 29 2005

Maria A. Pallante
Acting Register of Copyrights, United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

1 Title of This Work
299B

NATURE OF THIS WORK See instructions
FABRIC DESIGN (ARTWORK)

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared.

Title of Collective Work

If published in a periodical or serial give: **Volume Number Issue Date On Pages**

---

2 NOTE Under the law the "author" of a "**work made for hire**" is generally the employer not the employee (see Instructions) For any part of this work that was made for hire, check Yes in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part and leave the space for dates of birth and death blank.

a **NAME OF AUTHOR**
VARSITY SPIRIT FASHIONS & SUPPLIES INC

DATES OF BIRTH AND DEATH
Year Born Year Died

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author's Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled in USA

Was this Author's Contribution to the Work:
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

☒ 2 Dimensional artwork

☐ Reproduction of work of art

☐ Map

☐ Photograph

☐ Jewelry design

☐ Technical drawing

☐ Text

☐ Architectural work

---

b **Name of Author**

_____

Dates of Birth and Death

Year Born Year Died

_____ _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author's Nationality or Domicile

Name of Country

Citizen of _____

or

Domiciled in _____

Was this Author's Contribution to the Work

Anonymous? ☐ **Yes** ☐ No

Pseudonymous? ☐ **Yes** ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

- ☐ 3 Dimensional sculpture
- ☐ 2 Dimensional artwork
- ☐ Reproduction of work of art
- ☐ Map
- ☐ Photograph
- ☐ Jewelry design
- ☐ Technical drawing
- ☐ Text
- ☐ Architectural work

---

3 a **Year in Which Creation of This Work Was Completed** 1998 Year

This information must be given in all cases.

b **Date and Nation of First Publication of This Particular Work**

Complete this information ONLY if this work has been published.

Month Day Year

January 1999

USA Nation

4 See instructions before completing this space.

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2.

VARSITY SPIRIT FASHIONS & SUPPLIES INC
6745 LENOX CENTER COURT
MEMPHIS, TN 38115

Transfer If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

DO NOT WRITE HERE
OFFICE USE ONLY

APPLICATION RECEIVED
APR 29 2005

ONE DEPOSIT RECEIVED
APR 29 2005

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

MORE ON BACK

Complete all applicable spaces (numbers 5-9) on the reverse side of this page

See detailed instructions.

Sign the form at line 8.

DO NOT WRITE HERE

EXAMINED BY
CHECKED BY
CORRESPONDENCE

FORM VA
FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

5 **PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ **Yes** ☒ **No** if your answer is "Yes," why is another registration being sought? (Check appropriate box)

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give **Previous Registration Number Year of Registration**

_____ _____

---

6 **DERIVATIVE WORK OR COMPILATION** Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.

a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates.

N/A

b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

N/A

---

7 **DEPOSIT ACCOUNT** If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

a. **Name** **Account Number**

---

b. **CORRESPONDENCE** Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP

Arlana S. Cohen Esq
Cowan, Liebowitz & Latman PC
1133 Avenue of the Americas New York NY 10036-6799

Area code and daytime phone number (212) 790-9200
Fax number (212) 575-0671
Email asc@cll.com

---

8 **CERTIFICATION*** I, the undersigned, hereby certify that I am the

---

* **17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.**

check only one

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☒ authorized agent of VARSITY SPIRIT FASHIONS & SUPPLIES INC.

Name of author or other copyright claimant, or owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date. If this application gives a date of publication in space 3, do not sign and submit it before that date.

Arlana S. Cohen Esq. Date 4/28/05

Handwritten signature (X)

X_____

_____

9 Certificate will be mailed in window envelope to this address

Name
Arlana S Cohen Esq
Number/Street/Apt
1133 Avenue of the Americas
City/State/ZIP
New York New York 10036

YOU MUST

Complete all necessary spaces
Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE

1. Application form

2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*

3. Deposit material

MAIL TO

Library of Congress
Copyright Office
101 Independence Avenue S.E.
Washington, DC 20559-6000

Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000

Rev: August 2003–30,000 Web Rev: June 2002
Printed on recycled paper

U.S. Government Printing Office: 2003–496-605/60.029

February 19, 2009

[Seal of the United States Copyright Office 1870]

LIBRARY OF CONGRESS
Washington D.C. 20559-6000

COWAN, LIEBOWITZ & LATMAN, PC
ATTN: THOMAS KJELLBERG
1133 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-6799

Corresp. ID: 1-22P7C7
Re: 522; 059; 535; 017; 242; 057; 9213; and 9314

Dear Mr. Kjellberg:

This refers to your letter dated January 8, 2009, requesting reconsideration of our refusal to register the above eight works. You made this request on behalf of Varsity Brands, Inc.

We have carefully reviewed these works, articles of clothing, in light of the points raised in your letter. Upon further review, we have decided to register a copyright claim in all eight of these works because we believe that each work contains a sufficient, although minimal, amount of original and creative **separable** artistic or graphic authorship in the treatment and arrangement of the pre-existing elements, coupled with their coloring, found on the surface of each work that may be regarded as copyrightable and, therefore, support a copyright registration.

Our decision to register these works is based on the low standard for copyrightability articulated in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). The effective date of registration for each work is July 9, 2008, the date that we

originally received the applications, deposit material, and filing fees. The certificates of registration are being mailed separately and should arrive soon.

We hope that this resolves the matter satisfactorily for both you and your client.

Sincerely,
Virginia Giroux-Rollow
Attorney Advisor
Examining Division
By: [Virginia Giroux-Rollow]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION AND VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,	)	No.. 2:10-cv-02508-BBD-cgc
Plaintiffs,	)	
v		
STAR ATHLETICA, L.L.C.		
Defendant.		

FIRST AMENDMENT TO COMPLAINT

COME NOW Plaintiffs Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (collectively, "Varsity"), by and through counsel, and file this First Amendment to its Complaint to amend paragraphs 14(e) and 55-58 and substitute amended exhibits for Exhibits 9 and 19 which correspond to the amended paragraphs of the Complaint. Accordingly, Varsity submits the amendments underscored below to the following paragraphs in Varsity's Complaint as well as Amended Exhibits 9 and 19 attached hereto:

14. (e) Varsity Design 074 and Defendant's Design B, appearing at page 4 of its catalog (copies attached hereto respectively as Amended Exhibit 9 and Exhibit 10).

55. Design 074 is registered in Varsity's name at the United States Copyright Office under Registration No. VA 1-411-535, with an effective date of May

9, 2007. A copy of the Certificate of Registration is attached hereto as Amended Exhibit 19 (the deposit material is Amended Exhibit 9).

56. Defendants, without authorization from Varsity, are selling, distributing, advertising and have sold goods bearing a design that is copied from and substantially similar to Varsity's Design 074.

57. Defendants have thereby infringed Varsity's copyright in Design 074.

58. Upon information and belief, Defendant's infringing acts were committed with knowledge or in reckless disregard of Varsity's exclusive rights in Design 074 under the Federal Copyright Act.

Respectfully submitted,
s/ Adam S. Baldridge

Grady Garrison (TN BPR #8097)
Adam S. Baldridge (TN BPR # 23488)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue
Memphis, TN 38103
(901) 526-2000
(901) 577-2303 (facsimile)
ggarrison@bakerdonelson.com
abaldridge@bakerdonelson.com

Counsel for Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc.

[filed April 6, 2011]

AMENDED EXHIBIT 9

AMENDED EXHIBIT 19

Certificate of Registration
[Seal of the United States Copyright Office 1870]

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

[Marybeth Peters]
Register of Copyrights, United States of America

Form VA

For a Work of the Visual Arts

UNITED STATES COPYRIGHT OFFICE

RE VA 1-411-535

[BARCODE]

EFFECTIVE DATE OF REGISTRATION

May 09 2007
Month Day Year

RATE CONTINUATION SHEET:

---

1 Title of This Work
Design Number 074

NATURE OF THIS WORK See instructions
2-dimensional artwork

Previous or Alternative Titles

Publication as a Contribution If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work

---

If published in a periodical or serial give: Volume Number Issue Date On Pages

---

2 NOTE Under the law the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the "work" was prepared) as "Author" of that part and leave the space for dates of birth and death blank

a NAME OF AUTHOR

Varsity Brands, Inc.

DATES OF BIRTH AND DEATH

Year Born _____ Year Died _____

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

Author & Nationality or Domicile

Name of Country

Citizen of _____

or

Domiciled at United States

Was this Author a Contribution to the Work

Anonymous? ☐ Yes ☒ No

Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es) **See Instructions**

☐ 3 Dimensional sculpture

☒ 2 Dimensional artwork

☐ Reproduction of work of art

☐ Map
☐ Photograph
☐ Jewelry design
☐ Technical drawing
☐ Text
☐ Architectural work

---

b NAME OF AUTHOR

_____

DATES OF BIRTH AND DEATH
Year Born _____ Year Died _____

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

Author & Nationality or Domicile
Name of Country
Citizen of _____
or
Domiciled at _____

Was this Author a Contribution to the Work
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No

If the answer to either of these questions is "Yes," see detailed instructions.

Nature of Authorship Check appropriate box(es)
See Instructions
☐ 3 Dimensional sculpture
☐ 2 Dimensional artwork
☐ Reproduction of work of art
☐ Map
☐ Photograph
☐ Jewelry design

☐ Technical drawing
☐ Text
☐ Architectural work

---

3 a Year in Which Creation of This Work Was Completed 2006 Year

This information must be given in all cases.

b Date and Nation of First Publication of This Particular Work

Complete this information ONLY if this work has been published.

Month January Day 29 Year 2007

United States Nation

---

4 See instructions before completing this space
COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2.

Varsity Brands, Inc.
6745 Lenox Center Court
Memphis, TN 38115

Transfer if the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED
MAY 29 2007

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED
MAY 29 2007
FUNDS RECEIVED

MORE ON BACK

Complete all applicable spaces (numbers 5-9) on the reverse side of this page

See detailed instructions.

Sign the form at line 8.

DO NOT WRITE HERE

Page 1 of ___ pages

Examined by _____ Form VA
Checked by _____ For Copyright Office Use
Correspondence _____ Only
☐ Yes

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET

---

5 PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ Yes ☒ No if your answer is "Yes," why is another registration being sought? (Check appropriate box.)

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give

Previous Registration Number	Year of Registration

---

6 Derivative Work or Compilation Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation.

a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates.

b. Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

---

7 DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of account.

a. Name	Account Number

---

b. CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP

Cowan, Liebowitz & Latman PC,
Attn. Thomas Kjellberg
1133 Avenue of the Americas
New York NY 10036-6799
Area code and daytime phone number (212) 790-9202

Fax number (212) 575-0671
Email txk@cll.com

---

8 CERTIFICATION* I, the undersigned, hereby certify that I am the

Check only one

☐ author

☐ other copyright claimant

☐ owner of exclusive right(s)

☒ authorized agent of Varsity Brands, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date. If this application gives a date of publication in space 3 do not sign and submit it before that date.

Thomas Kjellberg Date 4/8/07

Handwritten signature (X)

X _____

---

* 17 U.S.C. §506(e): **Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.**

9 Certificate will be mailed in window envelope to this address

Name

Cowan, Liebowitz & Latman, P.C. /
Attn. Thomas Kjellberg
Number/Street/Apt
1133 Avenue of the Americas
City/State/ZIP
New York New York 10036-6799

YOU MUST

Complete all necessary spaces
Sign your application in space 8
SEND ALL 3 ELEMENTS IN THE SAME PACKAGE
1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO

Library of Congress Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559-6000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC., Plaintiffs,	)))))	No.: 2:10-cv-02508-BBD-cgc

v.

STAR ATHLETICA, L.L.C.
Defendant.

NOTICE OF SUBSTITUTED EXHIBITS

COME NOW Plaintiffs Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (collectively, "Varsity"), by and through counsel, and file this Notice of Substituted Exhibits 3, 5, and 7 to substitute certified copies of Varsity's deposit materials showing its Designs 0815, 299B, and 299A. Accordingly, Varsity submits the following substituted exhibits to its Complaint:

Substituted Exhibit 3 (attached hereto) – Varsity's Design 0815

Substituted Exhibit 5 (attached hereto) – Varsity's Design 299B

Substituted Exhibit 7 (attached hereto) – Varsity's Design 299A

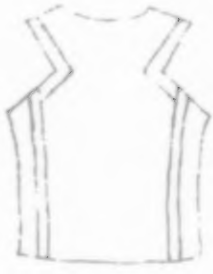
Respectfully submitted,
s/ Adam S. Baldridge
Grady Garrison (TN BPR #8097)
Adam S. Baldridge (TN BPR # 23488)
BAKER, DONELSON, BEARMAN,

CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue
Memphis, TN 38103
(901) 526-2000
(901) 577-2303 (facsimile)
ggarrison@bakerdonelson.com
abaldridge@bakerdonelson.com

Counsel for Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc.

[filed April 18, 2011]

Substituted Exhibit 3



Substituted Exhibit 5

Substituted Exhibit 7

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,	)	**No. 2:10-cv-0258-BBD-cgc**
Plaintiffs,	)	
v.	)	
STAR ARTHLETICA, L.L.C.,	)	
Defendant.	)	

ORDER DENYING DEFENDANT STAR ATHLETICA, L.L.C.'S MOTION TO DISMISS

Before the Court is Defendant Star Athletica, L.L.C.'s motion to dismiss for failure to state a claim upon which relief may be granted, filed November 20, 2010, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (D.E. #34.) Plaintiffs Varsity Brands, Inc., Varsity Sprit Corporation, and Varsity Fashions & Supplies, Inc., filed a response in opposition on December 29, 2010. Plaintiffs sue Defendant for copyright infringement, violation of the Lanham Act, and claims of unfair competition, inducing breach of contract, inducing breach of fiduciary duty, and civil conspiracy under Tennessee law. Plaintiffs allege that Defendant has copied and

marketed cheerleading uniforms that infringe Plaintiffs' original copyright-protected designs, adopted product naming conventions and style codes that mimic Plaintiffs', induced Plaintiffs' employees to violate valid noncompete agreements, and conspired with exiting employees to misappropriate Plaintiffs' proprietary information in order to provide it to Defendant.

In its motion to dismiss, Defendant argues that the registered copyrights Plaintiffs contend cover their cheerleading uniform designs in fact only cover the two-dimensional pictures Plaintiffs registered with the United States Copyright Office. Defendant further argues that Plaintiffs' suit attempts to impermissibly assert copyright protection in "useful articles." The Court concludes that the designs over which Plaintiffs assert copyright protection are separable from the useful articles to which they are attached and thus Plaintiffs may validly preclude reproduction of their cheerleading uniform designs on a competitor's uniforms. The Court further concludes that Plaintiffs' complaint alleges sufficient facts to state a plausible claim for relief under the Lanham Act for mimicking its naming conventions and style codes. Finally, the Court concludes that Plaintiffs' complaint sufficiently alleges causes of action under Tennessee law for Defendant's alleged mimicking of Plaintiffs' naming conventions and style codes and for Defendant's alleged inducement of employees to misappropriate proprietary information and violate their noncompete agreements.

Therefore, Defendant's motion to dismiss is **DENIED**.

I. BACKGROUND[1]

Varsity Brands, Inc., is a Delaware corporation, Varsity Spirit Corporation is a Tennessee corporation, and Varsity Spirit Fashions & Supplies, Inc., is a Minnesota corporation (collectively, "Varsity"). (Pls.' Compl. ¶¶ 1-3.)[2] Each corporation has its principal place of business in Memphis, Tennessee.[3] (Id.) Star Athletica ("Star") is a limited liability company organized under the laws of the state of Missouri with its principal place of business in Chesterfield, Missouri. (Id. ¶ 5.)

Varsity is engaged in the business of designing, manufacturing, and selling apparel and accessories for cheerleading and related activities. (Id. ¶ 8.) To create high-quality products, Varsity employs a team of designers to develop original, two-dimensional

---

[1] The following factual recitation is taken from Varsity's complaint and is assumed to be true for purposes of this motion only.

[2] On April 6, 2011, Varsity filed its First Amended Complaint making minor technical changes to certain of the paragraphs relevant to one of Varsity's allegations of copyright infringement. Because these changes had no effect on the arguments presented in Star's motion, the Court will continue to refer to the original complaint in resolving the instant motion to dismiss.

[3] The precise interrelationship of these three corporations is not evident from the complaint and is not relevant for purposes of the instant motion. The Court will hereafter discuss all three corporations as if they were a single entity.

designs that are reproduced and applied to Varsity's apparel and accessories. (Id. ¶ 9.) Further, to market its uniforms and accessories, Varsity annually employs models, photographers, and graphic designers for the production of full-color catalogs featuring its products. (Id. ¶ 12.)

Star is one of Varsity's competitors. (Id. ¶ 16.) Like Varsity, Star markets its products through catalogues, which it makes available on the internet and distributes through sales representatives and the mail. (Id. ¶ 13.) Without Varsity's permission, license, or consent, Star copied several Varsity designs for cheerleading uniforms and is now marketing those designs online and in its print catalogues. (Id. ¶ 14.) Each of the five designs at issue in this case generally consists of patterns of colored stripes that are applied to Varsity's uniforms. (See Exs. 1, 5, 7, and 9 to Pls.' Compl.) The designs are the subject of copyrights registered with the United States Copyright Office under Registration Nos. VA 1-417-427, VA 1-675-905, VA 1-319-228, VA 1-319-226, and VA 1-411-535. (Pls.' Compl. ¶¶ 28, 34, 41, 48, 55.)

Varsity formerly maintained a supply agreement with R.J. Liebe Athletic Lettering Company ("R.J. Liebe"). (See id. ¶ 16.) In retaliation for Varsity's termination of that agreement, R.J. Liebe began to compete with Varsity in the sale of cheerleading uniforms and related accessories. (Id.) Acting in concert with R.J. Liebe's President and Chief

Manager, Star[4] induced current and former Varsity employees in Memphis to aid Star in manufacturing cheerleading uniforms and accessories in violation of the employees' noncompete agreements. (Id. ¶ 17.) Specifically, Star induced former Varsity employee Rebecca Cook to solicit Varsity customers to purchase uniforms from Star in violation of her noncompete agreement with Varsity. (Id. ¶ 18.)

Further, Star encouraged Kerry Leake—either while employed by Varsity or after termination and while subject to a noncompete agreement—to steal the electronic files Varsity used to create its outline mascot letterings and monogramming. (Id. ¶ 19.) Star then used these electronic files to develop mascot letterings and monogramming that copied Varsity's designs. (Id.) In naming its outline mascot designs, Star adopted a convention that mimics Varsity's. (Id. ¶ 20.) For example, the Varsity design known as "ECM-1" corresponds to Star design "EOM-1." (Id.) Star even omits numbers when necessary to keep its naming system aligned with Varsity's. (Id.) Thus, Star's outline mascot names jump from "EOM-17" to "EOM-20," just as the names jump in Varsity's naming convention. (Id.) Moreover, some of Star's mascot designs duplicate Varsity designs that were previously not publicly available and were instead contained only in the internal Varsity files that Mr. Leake provided to Star. (Id.)

Star further obtained from R.J. Liebe 80,000 electronic tackle twill files owned and supplied by

---

[4] The precise relationship between Star and R.J. Liebe is not apparent from Varsity's complaint.

Varsity. (Id. ¶ 21.) Star then selected style codes for its tackle twill offerings that are either identical or deceptively similar to Varsity's style codes. (Id. ¶ 22.) Star, for example, uses the codes "TTCRAZ," "TTPAW," "TTMEG," and "TTCHV," which are identical to the codes used by Varsity. (Id.) The majority of Star's other style codes are very similar to Varsity's codes. (Id.)

Both during his employment with Varsity and after his employment was terminated, Mr. Leake provided Star access to Varsity's proprietary uniform patterns and other proprietary information in order to aid Star in competing with Varsity. (Id. ¶ 23.) Either independently or through Mr. Leake, Star also induced one or more of Varsity's uniform manufacturers to produce cheerleading uniforms for Star in violation of their contracts with Varsity. (Id. ¶ 24.)

Varsity's legal counsel sent Star a cease and desist letter on March 4, 2010. (Id. ¶ 25.) On March 8, 2010, Star's counsel rejected Varsity's demands. (Id. ¶ 26.) Varsity filed the instant suit in the United States District Court for the Western District of Tennessee on July 9, 2010. The first five counts of Varsity's complaint allege infringement of Varsity's copyrighted designs for cheerleading uniforms. Additionally, Varsity asserts causes of action for violation of the Lanham Act, unfair competition under Tennessee common law, inducing breach of contract under both Tenn. Code Ann. § 47-50-109 and Tennessee common law, inducing breach of fiduciary duty under Tennessee common law, and civil conspiracy under Tennessee common law. Varsity seeks money damages, attorney fees and

costs, impoundment of the infringing goods, and an injunction against further infringement.

II. LEGAL STANDARD

A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure only tests whether a cognizable claim has been pled. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). To determine whether a motion to dismiss should be granted, the court examines the complaint, which must contain a short and plain statement of the claim showing that the pleader is entitled to relief. See Fed. R. Civ. P 8(a)(2). It must also provide the defendant with fair notice of the plaintiff's claim as well as the grounds upon which it rests. Conley v. Gibson, 355 U.S. 41, 47 (1957); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). While the complaint need not present detailed factual allegations, to be cognizable it must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not suffice. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007); see also Scheid, 859 F.2d at 436-37

Likewise, the complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555 (citation omitted). The mere possibility that some set of undisclosed facts will support recovery is insufficient to overcome a 12(b)(6) challenge. Twombly, 550 U.S. at 561; see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). On a motion to dismiss under Rule 12(b)(6), the court accepts as true all factual

allegations made in the complaint and construes them in the light most favorable to the plaintiff. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989); Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 295-96 (6th Cir. 2008); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983). The court, however, only takes as true well-pled facts, and it will not accept legal conclusions or unwarranted factual inferences. Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 405-06 (6th Cir. 1998); see Iqbal, 129 S. Ct. at 1949.

III. ANALYSIS

A. Claim for Copyright Infringement

Article I, § 8, clause 8 of the United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Pursuant to that power, Congress has enacted Title 17 of the United States Code with the goal of protecting copyrights in authors' creative works. Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 316 (6th Cir. 2004). "Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and

sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." 17 U.S.C. § 102(a). Subject to limited exceptions, only the holder of a copyright or a licensee of the copyright owner is entitled "to reproduce the protected work, to prepare derivative works, and to distribute copies to the public." Murray Hill Publ'ns, Inc., 361 F.3d at 316 (citing 17 U.S.C. § 106(1)-(3)). Section 501 of Title 17 imposes liability on anyone who infringes the exclusive rights of a copyright owner. 17 U.S.C. § 501; Bridgeport Music, Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 621 (6th Cir. 2004). "To succeed in a copyright infringement action, a plaintiff must establish that he or she owns the copyrighted creation, and that the defendant copied it." Kohus v. Mariol, 328 F.3d 848, 853 (6th Cir. 2003) (citing Wickham v. Knoxville Int'l Energy Exposition, Inc., 739 F.2d 1094, 1097 (6th Cir. 1984)).

With respect to Varsity's copyright infringement claims, Star argues that Varsity fails to state a cause of action because Varsity's copyright registrations grant protection only to the specific pictures Varsity registered with the Copyright Office. Thus, Star asserts that when Varsity registered pictures of cheerleading uniforms, Varsity only acquired copyright protection in the exact pictures of the uniforms registered, not in the designs of the cheerleading uniforms depicted. Because Star has produced no uniforms bearing copies of the pictures registered, Star contends that Varsity fails to allege a claim of copyright infringement. Instead, Star contends that, since Varsity's designs are not separable from the utilitarian aspect of its uniforms, the current lawsuit is an attempt by Varsity to use

its registered copyrights to gain protection in fashion or dress designs, which copyright law does not allow.

1. Presumption of Validity

Varsity avers that all but two of the copyrighted designs at issue were registered with the Copyright Office within five years "after first publication" and that the copyrights of those designs are thereby entitled to a presumption of validity under 17 U.S.C. § 410(c).[5] See Frank Betz Assocs., Inc. v. J.O. Clark Const., L.L.C., No. 3:08-cv-00159, 2010 WL 2253541, at *13 (M.D. Tenn. May 30, 2010) (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 552, 534 (6th Cir. 2004)) ("[I]t is well established under Sixth Circuit precedent that both the originality and the non-functionality of a copyrighted work are presumptively established by copyright registration.").[6] Varsity registered one of

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[5] Section 410(c) of Title 17 reads as follows: "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court."

[6] Varsity represents in its response that the Copyright Office initially refused to register some designs Varsity submitted that were similar to those at issue in this case, but that the Copyright Office then re-reviewed the submissions and determined that they were copyrightable. Because these facts are not contained in Varsity's complaint, the Court will not rely on them in deciding this motion under Rule 12(b)(6). Cf. Fed. R. Civ. P 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not

[Footnote continued on next page]

the remaining two designs five years and six months after first publication and the other six years and four months after first publication. Therefore, under § 410(c), the evidentiary weight for these two copyrights is "within the discretion of the court." 17 U.S.C. § 410(c). Since it registered these works not long after the passage of five years, Varsity urges the Court to accord them a presumption of validity as well. Even without the presumption as to several of the copyrighted designs, however, the Court finds that Varsity's complaint sufficiently alleges copying of subject matter that is legitimately eligible for copyright protection.

2. Fabric Designs as Copyrightable Works

Varsity urges the Court to reject Star's contention that Varsity's copyrights extend only to the exact two-dimensional pictures registered and that its copyrights do not preclude Star's unauthorized manufacture of uniforms similar to those shown in the pictures. Star correctly notes that, because clothing is a useful article,[7] it is normally not subject to copyright protection, even if the "the appearance of the useful article is determined by aesthetic considerations." 56 Fed.

[Footnote continued from previous page]
excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

[7] A "useful article" for purposes of copyright law is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" 17 U.S.C. § 101.

Reg. 56530-02 (Nov. 5, 1991). Thus, dress designs are not eligible for copyright protection. Whimsicality, Inc. v. Rubie's Costume Co., Inc., 891 F.2d 452, 455 (2d Cir. 1989) ("We have long held that clothes, as useful articles, are not copyrightable.") (citations omitted). Fabric designs, however, are to be distinguished from "dress designs" and are copyrightable. Folio Impressions, Inc. v. Byer California, 937 F.2d 759, 763 (2d Cir. 1991) (citations omitted).

Although Star concedes that fabric designs are copyrightable, it asserts that a copyright in fabric design extends only to the two-dimensional design itself. Contrary to Star's assertions, incorporating copyright-protected elements of a two-dimensional design into a three-dimensional piece of clothing is generally a form of copying proscribed by copyright law. See Eliya, Inc. v. Kohl's Dep't Stores, No. 06 Civ 195(GEL), 2006 WL 2645196, at *8-12 (S.D.N.Y. Sept. 13, 2006) (finding that design elements of a shoe could qualify for copyright protection but that form and function were blended in the design of the shoe at issue such that the design elements of the shoe were no longer subject to copyright); cf. Winfield Collection, Ltd. v. Gemmy Indus. Corp., 147 F. App'x 547, 551-52 (6th Cir. 2005) (recognizing infringement where three-dimensional item is made representing item from two-dimensional picture protected by copyright). Therefore, it is no defense to say that the picture Varsity registered with the Copyright Office is not duplicated on an item of clothing. Instead, it is sufficient for a claim of copyright infringement if an item of clothing copies the clothing shown in the picture—provided the item of clothing in the picture includes copyright-protectable elements and does not

merely depict a useful article. "[T]he crucial issue in determining the[] copyrightability [of elements found in useful articles] is whether they possess artistic or aesthetic features that are physically or conceptually separable from their utilitarian dimension." Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411, 414 (2d Cir. 1985); see, e.g., Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970, 974 (6th Cir. 1983) ("[B]ecause we conclude that the *Air Coupe* is not a 'useful article,' we need not consider whether certain aspects of the item are copyrightable individually as separate and independent features. This provision applies only to items that are first, as a whole, disallowed copyright protection as 'useful articles,' and thus has no application to the present case.").

3. Merger and Separability

Star asserts that Varsity's fabric designs are not separable from the useful articles (i.e., clothing) to which they are applied and that a "merger of form and function" thereby occurs in which any otherwise copyrightable designs lose their distinctness from the underlying utilitarian article. For support, Star relies on the noted Second Circuit case of Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987). In Brandir, the Second Circuit held that a bike rack with a ribbon-like design was not subject to copyright protection because "[f]orm and function are inextricably intertwined in the rack, its ultimate design being as much the result of utilitarian pressures as aesthetic choices." 834 F.2d 1142, 1147 (2d Cir. 1987). The copyrighted designs at issue in this case, however, are quite different from the bike rack at issue in Brandir. The designs of Varsity's cheerleading

uniforms, as they are described in Varsity's complaint, are not dictated by "utilitarian pressures," but are intended to enhance the aesthetic, rather than utilitarian, aspects of the uniforms it markets. In such a situation, the earlier Second Circuit decision in Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980), is the more factually analogous case. In Kieselstein-Cord, the Second Circuit concluded that an ornate belt buckle design qualified for copyright protection because the design was conceptually separable from the belt's utilitarian function. 632 F.2d 989, 993-94 (2d Cir. 1980). Likewise, the elements Varsity describes as protected by copyright are separable from the uniforms' utilitarian function as clothing.[8] See Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 328 (2d Cir. 2005) ("[I]f a useful article

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[8] Star also argues that the Court should disallow copyright protection in Varsity's designs because they are not "separately marketable." The test on which Star relies was developed by the Fifth Circuit in Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411 (5th Cir. 2005). At issue in Galiano were casino uniforms, which the appellate court determined were not separately marketable other than as casino uniforms and thus were only useful articles. 416 F.3d 411, 422 (5th Cir. 2005). The court recognized that fabric design is usually subject to copyright protection and articulated a "likelihood-of-marketability" test "*for garment design only*" covering "the shape, style, cut and dimensions for converting fabric into a finished dress or other clothing garment." Id. at 419, 421 (emphasis in original). As discussed above, the instant case concerns fabric design, which does not fall within the ambit of "garment design" as discussed by the Fifth Circuit. Accordingly, the Fifth Circuit's "likelihood-of-marketability" test is inapplicable to the instant case.

incorporates a design element that is physically or conceptually separable from the underlying product, the element is eligible for copyright protection."). Because Varsity's designs are separable, Varsity may validly assert copyright protection over the designs, and Star's motion to dismiss Varsity's copyright infringement claims is denied.

B. Varsity's Lanham Act Claim

The Lanham Act, in pertinent part, prohibits the commercial use of "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities[.]" 15 U.S.C. § 1125(a)(1)(A)-(B). The Sixth Circuit has explained that marks "described as 'arbitrary,' 'fanciful,' or 'suggestive' are 'inherently distinctive' and protectable" under trademark law, while "[a] so-called 'generic' mark may never qualify for trademark protection." Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 502 F.3d 504, 513 (6th Cir. 2007) (citing Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992)). "Between these two poles lie 'descriptive' marks. Marks that are descriptive are not inherently distinctive but may enjoy the benefit of protection if

they develop a 'secondary meaning.'" Id. (citations and footnote omitted).

Although Star reads Varsity's complaint as alleging that the copying of its cheerleading uniforms violated the Lanham Act, Varsity's Lanham Act claim is premised on Star's adoption of Varsity's naming conventions and style codes. Varsity alleges that these conventions and codes are protected under the Lanham Act because they are closely associated with Varsity's products. Whether these conventions and codes are merely generic and thus unprotected or whether they are truly descriptive marks with secondary meanings must be determined as a matter of proof, not pleading, and thus cannot be resolved on a Rule 12(b)(6) motion to dismiss. Therefore, Star's motion to dimiss Varsity's Lanham Act claim is denied.

C. Varsity's State Law Causes of Action

In addition to arguing that Varsity's complaint fails to sufficiently allege federal law causes of action for copyright infringement and violation of the Lanham Act, Star also urges the Court to dismiss Varsity's state law claims for relief. First, Star broadly argues that Varsity's remaining allegations are "bare bones" and incoherent and thereby fail to describe a plausible claim for relief in accordance with Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal. The Court, however, finds that the remaining allegations must be considered specifically rather than generally. After separately considering each of the remaining counts of Varsity's complaint, the Court finds that Varsity's causes of action sufficiently meet the Twombly standard, thus precluding dismissal under Rule 12(b)(6).

1. Unfair Competition

Star argues that Varsity's claim for unfair competition under Tennessee law must be dismissed because Varsity's complaint fails to allege that Star engaged in any of the various types of conduct recognized as actionable, unfair competition under Tennessee law. See B & L Corp. v. Thomas & Thorngren, Inc., 917 S.W.2d 674, 681 (Tenn. Ct. App. 1995) (citing Prosser and Keeton on the Law of Torts § 130, at 1013 (5th ed. 1984)) ("Unfair competition is a generic name for several related torts involving improper interference with business prospects."). Varsity's response makes clear that it seeks relief for unfair competition only under a "passing off" theory. To establish a claim of unfair competition by means of "passing off," the plaintiff must prove that "(1) the defendant engaged in conduct which 'passed off' its organization or services as that of the plaintiff; (2) in engaging in such conduct, the defendant acted with an intent to deceive the public as to the source of services offered or [the] authority of its organization; and (3) the public was actually confused or deceived as to the source of the services offered or the authority of its organization." Dade Int'l, Inc. v. Iverson, 9 F. Supp. 2d 858, 861 (M.D. Tenn. 1998) (quoting Sovereign Order of St. John v. Grady, 119 F.3d 1236, 1243 (6th Cir. 1997)). Notwithstanding Star's assertion that Varsity fails to allege facts supporting a "passing off" claim, Varsity's complaint alleges that Star developed and utilized mascot naming conventions and style codes that are deceptively similar to Varsity's as part of marketing uniforms that incorporate Varsity's copyrighted uniform designs. Although Varsity's complaint does not allege that the public was actually deceived, the

Court finds that, given the other extensive factual allegations of Varsity's complaint, an allegation of public deception can be reasonably inferred in this case. Therefore, Varsity's allegations are facially plausible and sufficient to withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim.[9]

2. Inducing Breach of Contract[10]

Star next contends that Varsity's complaint fails to establish either a statutory or common law claim for inducing breach of contract. "Under Tennessee law, there are seven elements to an action for inducement to breach a contract, both at common law and under T.C.A. § 47-50-109. These elements are also necessary to establish a cause of action for conspiracy to induce a breach of contract. The plaintiff must prove: (1) that there was a legal contract; (2) that the wrongdoer had sufficient knowledge of the contract; (3) that the wrongdoer intended to induce its breach; (4) that the wrongdoer acted maliciously; (5) that the contract was breached; (6) that the act complained of was the proximate cause of the breach; and (7) that damages resulted from the breach." TSC Indus., Inc. v. Tomlin, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987). Despite Star's

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[9]Star also asserts that Varsity's state law claim for unfair competition is preempted by federal copyright law. Because Varsity's unfair competition claim is entirely separate from the factual allegations that support its copyright claims, the Court finds this argument to be without merit.

[10] Nowhere in its memorandum in support of its motion to dismiss does Star specifically address Varsity's breach of fiduciary duty claim.

assertion that Varsity's complaint is vague and lacking in detail, its complaint specifically avers that Star knowingly induced Rebecca Cook and Kerry Leake to violate their noncompete agreements so that Star could obtain a competitive advantage by exploiting Varsity's proprietary information. Accordingly, Varsity's complaint sufficiently alleges inducement to breach of contract under both the common law and Tenn. Code Ann. § 47-50-109.[11]

3. Civil Conspiracy

Finally, Star asserts that Varsity's civil conspiracy claim must be dismissed because Varsity has not alleged this cause of action with the requisite specificity. "The elements of a cause of action for civil conspiracy are: (1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury." Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006) (citing Morgan v. Brush Wellman, Inc., 165 F. Supp. 2d 704, 720 (E.D. Tenn. 2001)); see O'Dell v. O'Dell, 303 S.W.3d 694, 697 (Tenn. Ct. App. 2008). In the instant case, Varsity's complaint clearly alleges that Star acted in concert with Rebecca Cook, Kerry Leake, and possibly other employees through improper means—including breach of contract and breach of fiduciary duty—to exploit Varsity's intellectual property and proprietary information for

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[11] Varsity clarifies in its response that it is not currently pursuing a claim for breach of contract as to any breach by uniform manufacturers of their contracts with Varsity.

Star's enrichment at Varsity's expense. This suffices to allege a claim for civil conspiracy under Tennessee law and is sufficiently detailed to satisfy Rule 8(a) of the Federal Rules of Civil Procedure. Accordingly, Star's motion to dismiss is denied as to Varsity's civil conspiracy claim.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Defendant Star Athletica, L.L.C.'s motion to dismiss.

IT IS SO ORDERED, this the 21st day of April, 2011.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC.,
VARSITY CORPORATION and
VARSITY FASHIONS & SUPPLIES, INC.,

Plaintiffs,

v. No. 10-cv-02508

STAR ATHLETICA, L.L.C.,

Defendant.

ANSWER AND COUNTERCLAIM

The defendant Star Athletica, LLC ("Star" or "Defendant"), for its answer to the complaint filed against it by the plaintiffs Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Fashions & Supplies, Inc. (collectively identified as "Varsity" or as "Plaintiff") and, pursuant to Rule 13 of the Federal Rules of Civil Procedure, for its counterclaim against Varsity, Star respectfully states as follows:

THE PARTIES, JURISDICTION AND VENUE

1. Defendant admits that Plaintiff has filed a civil action alleging violation of the copyright laws of the United States, 17 U.S.C. 101 et seq., as amended (the "Copyright Act"), violations of the Lanham Act, 15 U.S.C. 1125(a), and unfair competition, inducing breach of contract, inducing breach of fiduciary duty

and civil conspiracy and denies all other allegations in paragraph 1.

2. Defendant is without sufficient information and knowledge to admit or deny and therefore denies the same.

3. Defendant is without sufficient information and knowledge to admit or deny and therefore denies the same.

4. Defendant is without sufficient information and knowledge to admit or deny and therefore denies the same

5. Denied, except that Defendant admits that Defendant is a limited liability company organized under the laws of the State of Missouri and has a place of business located at 582 Goddard Avenue, Chesterfield Missouri 63005..

6. Denied.

7. Denied.

FACTUAL BACKGROUND

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied, except that Star admits that it has maintained a website at www.starathletica.com through which many of its designs, which are all original, can be seen

14. Denied, including all sub-parts, (a) – (e).

15. Denied, except admits that Defendant has maintained a website at www.starathletica.com through which many of its designs, which are all original, can be seen.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

FIRST CLAIM FOR RELIEF
(Copyright Infringement)

27. Denied, except to the extent as may have been otherwise pleaded before.

28. Defendant is without sufficient information and knowledge to admit or deny and therefore deny the same

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

SECOND CLAIM FOR RELIEF
(Copyright Infringement)

34. Denied, except to the extent as may have been otherwise pleaded before.

35. Defendant is without sufficient information and knowledge to admit or deny and therefore deny the same.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

THIRD CLAIM FOR RELIEF
(Copyright Infringement)

41. Denied, except to the extent as may have been otherwise pleaded before.

42. Defendant is without sufficient information and knowledge to admit or deny and therefore deny the same.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

FOURTH CLAIM FOR RELIEF
(Copyright Infringement)

47 Denied, except to the extent as may have been otherwise pleaded before.

48. Defendant is without sufficient information and knowledge to admit or deny and therefore deny the same.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

FIFTH CLAIM FOR RELIEF
(Copyright Infringement)

54. Denied, except to the extent as may have been otherwise pleaded before

55. Defendant is without sufficient information and knowledge to admit or deny and therefore deny the same.

56. Denied.

57 Denied.

58. Denied.

59. Denied.

60. Denied.

SIXTH CLAIM FOR RELIEF
(Unfair Competition)

61. Denied, except to the extent as may have been otherwise pleaded before.

62. Denied.

63. Denied.

64. Denied.

SEVENTH CLAIM FOR RELIEF
(Inducing Breach of Contract-Statutory)

65. Denied, except to the extent as may have been otherwise pleaded before

66. Denied

67. Denied.

68. Denied.

69. Denied.

70. Denied.

EIGHTH CLAIM FOR RELIEF
(Breach of Contract-Common Law)

71. Denied, except to the extent as may have been otherwise pleaded before

72. Denied.

73. Denied.

74. Denied.

75. Denied.

NINTH CLAIM FOR RELIEF
(Inducing Breach of Fiduciary Duty)

76. Denied, except to the extent as may have been otherwise pleaded before.

77 Denied.

78. Denied.

79. Denied.

TENTH CLAIM FOR RELIEF
(Violation of Lanham Act)

80. Denied, except to the extent as may have been otherwise pleaded before.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

ELEVENTH CLAIM FOR RELIEF
(Civil Conspiracy)

86. Denied, except to the extent as may have been otherwise pleaded before.

87. Denied.

88. Denied

89. Denied.

90. Denied.

AFFIRMATIVE DEFENSES

91. Plaintiff's claimed designs do not meet the standards for copyrightability and are therefore invalid and unenforceable.

92. The Court lacks personal jurisdiction over the Defendant.

93. Venue is improper in the Western District of Tennessee.

94. The complaint fails to state a cause of action upon which relief can be granted.

95. Plaintiff's claims are barred by the doctrine of laches.

96. Plaintiff's claims are waived.

97. Plaintiff's claims are barred by the applicable statute of limitations.

98. Plaintiff's claims are barred because of unclean hands and Plaintiffs are not entitled to equitable relief on that basis.

99. Plaintiff's claims are barred by acquiescence.

100. The relief sought by Plaintiff is barred by the doctrine of estoppel.

101. The Plaintiff's alleged copyrights are for functional utilitarian clothing, useful articles, and therefore not copyrightable subject matter under 17 U.S.C. § 101.

102. Plaintiff's copyrights in and to the designs it claims are invalid and unenforceable because the Plaintiff has obtained them with fraud upon the copyright office.

103. Plaintiff's copyrights in and to the designs are invalid and unenforceable because of its copyright misuse.

104. Plaintiff's copyrights in and to the designs are invalid and unenforceable because of insufficient originality.

105. Plaintiff's copyrights in and to the designs are invalid and unenforceable because of functionality.

106. Plaintiff's copyrights in and to the designs are invalid and unenforceable because their lack of separability without affecting utility

107 Plaintiff's copyrights in and to the designs are invalid and unenforceable on that basis.

108. Plaintiff's claims for copyright infringement are not valid under the doctrine of fair use.

109. Plaintiff has not suffered injury to its business or property by reason of any conduct of Defendant that violated the copyright laws or any other legal duty.

110. Plaintiff's claims of copyright infringement are invalid as the designs alleged are not separable from the clothing at issue.

111. Plaintiff's designs are substantially dissimilar to and distinguishable from Defendant's allegedly infringing designs.

All allegations of the complaint not previously admitted or denied are hereby denied. The Defendant Star Athletica, L.L.C., having fully answered all of the claims made against it moves the Court to dismiss the complaint at that cost of the Plaintiff Varsity and award Star its attorneys' fees and all other and further relief to which it may be entitled.

COUNTERCLAIM

Counterclaiming-Plaintiff Star Athletica, L.L.C. ("Star" or "the Counterclaimant") by and through its undersigned attorneys as and for its counterclaims against Varsity Brands, Inc., Varsity Spirit Corporation and Varsity Fashions and Supplies, Inc., collectively referred to herein as "Varsity" or "Counter-Defendant'), assuming the posture of coun-

terclaimant pursuant to Rule 13 of the Federal Rules of Civil Procedure, alleges upon information and belief as follows for its causes of action against the Plaintiff Varsity:

1. Counterclaimant Star is a limited liability company organized under the laws of the State of Missouri and has a place of business located at 582 Goddard Avenue, Chesterfield Missouri 63005.

2. Counterclaimant Star incorporates by reference the allegations of Paragraphs 2 through 4 of the Complaint with respect to the respective business organizations and status of the corporations included in the Counter-Defendant Varsity.

3. Star is in the business of manufacturing and selling cheerleader clothing and related accessories.

4. Varsity is in the business of manufacturing and selling cheerleader clothing and related accessories.

5. Star and Varsity compete with each other in the market for cheerleader clothing and related accessories within the United States.

6. The relevant market in which they compete is in the market for cheerleader clothing and related accessories that are sold primarily to schools with sports teams such as public schools, middle schools, high schools, colleges and universities, professional and semi-professional sport teams, and sports clubs and organizations within the United States.

7. Varsity has well over a 50%-share of the relevant market, and it is believed to be in excess of 70% now and rapidly growing as a result of Varsity's wrongful anti-competitive behavior.

8. Varsity has developed, or is in great danger of imminently developing, monopoly power in the relevant market with the ability to control pricing and exclude competitors from entering its marketplace.

9. Varsity has done, and is doing this, intentionally, knowingly and willfully through such wrongful devices as buying up smaller competitors and making false representations to the Copyright Office to facilitate the registration of a broad base of copyrighted designs that cover the functional attributes and the utility required to make and successfully sell cheerleader uniforms.

10. 17 U.S.C. §101 provides the legal definition of "useful articles", as follows:

> A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

17 U.S.C. §101.

11. Cheerleader uniforms are useful articles as defined by 17 U.S.C. §101.

12. Section 1 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, "The Copyright Office has generally refused to register claims to copyright in three-dimensional aspects of clothing or costume design on the ground that articles of clothing and costumes are useful articles of clothing that ordinarily contain no artistic authorship separable from their overall utilitarian shape."

13. Section 1 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, "A two-dimensional design applied to the surface of clothing may be registered, but this claim is ordinarily made by the fabric producer rather than the garment or costume designer. Moreover, this claim to copyright is ordinarily made when the two-dimensional design is applied to the fabric and before the garment is cut from the fabric."

14. Section 1 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, " 'ladies' dress' and other clothing cannot be protected by copyright merely on the ground that the appearance of the useful article is determined by aesthetic considerations."

15. Section 4 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, "Garment designs (excluding separately identifiable pictorial representations of designs imposed upon the garment) will not be registered even if they contain ornamental features or are intended to be used as historical or period dress."

16. Section 6 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, "Garments are useful articles, and the design of such garments are generally outside of the copyright law. Parties who wish to modify this position must address their concerns to the Congress, since establishment of such protection must have Congressional authorization."

17. Section 6 of the October 29, 1991 U.S. Copyright Office Policy Decision ML-435, published in the Federal Register on November 5, 1991 (p. 56530) provides, "The general policy of nonregisterability of garment designs will be applied not only to ordinary wearing apparel, but also to period and historical dress, and uniforms."

18. Varsity's cheerleading uniform designs were designed with no other purpose other than those of cheerleading uniforms.

19. Varsity's cheerleading uniform designs were designed to facilitate easy movement during cheerleading.

20. Varsity's cheerleading uniform designs were designed to ensure safe clothing for cheerleading.

21. Varsity's cheerleading uniform designs were designed to identify the wearers as cheerleaders.

22. The designs in Varsity's copyrights are not commercially used in any manner other than as cheerleading uniforms.

23. All of Varsity's copyrights contain elements that are in the public domain.

24. Varsity states in Paragraph 14 of its Complaint, as amended, that the Varsity Designs at issue are numbered: Varsity Designs 078, 0815, 299B, 299A, and 074. These design numbers also correspond to the model numbers of the articles of clothing (Cheerleading Uniforms) in its Varsity Catalogs.

25. In spite of being repeatedly informed by the Copyright Office in writing that its works and its cheerleader uniforms are articles of clothing for the purposes of copyright law and registration, Varsity

willfully continues to misidentify them as works of art, such as fabric designs. The purpose of this misidentification has been, and is, to mislead and disguise the utility and the non-separability of their registered deigns and to avoid the restrictions on copyright law that would otherwise prevent the issuance of copyright registrations and prevent their obtaining the present monopoly over the use of these designs for articles of clothing for a period of at least ninety-five (95) years.

26. A design patent for an article of clothing, by comparison, has a rigorous examination of prior art (which copyright registration lacks) and lasts a period of only (14) years. Varsity holds no such patents for the Varsity designs at issue.

27. The United States Congress has long considered, but, to date, has failed to enact legislation to extend copyright protection to articles of clothing (i.e., fashion designs) for even a ***very*** short period – three (3) years – most recently in the form of proposed bills known as The Design Piracy Prohibition Act. H.R. 2033, S. 1957, and H.R. 2196 were bills of the same name introduced in the United States Congress that would have amended Title 17 of the United States Code to provide *sui generis* protection to fashion designs for a period of three years. These proposed Acts would have extend protection to "the appearance as a whole of an article of apparel, including its ornamentation," with "apparel" defined to include "men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;" "handbags, purses, and tote bags;" belts, and eyeglass frames. In order to receive the three-year term of protection, the designer would be

required to register with the U.S. Copyright Office within six months of going public with the design. The failure of these bills to be passed into law is conclusive evidence that Congress never intended for the copyright law to be misused in the manner Varsity has accomplished with it current copyright registrations.

28. Varsity has established and continues to perpetuate a deceptive copyright and trademark scheme to keep competitors in the market for cheerleader uniforms (articles of clothing) from effectively competing with Varsity through behavior that restricts competition that invariably reduces competition for the sale of cheerleader uniforms and undermines Star's competitive standing in the marketplace.

29. Varsity's misuse of its copyright registrations is artificially creating barriers to entry in the secondary market for competing sales of articles of clothing, clothing consisting of non-separable design elements, designs which are ineligible for copyright protection.

30. Varsity is making false representations to its competitors and the marketplace, alleging that is has trademark protection for its naming conventions and copyright protection, not for two-dimensional designs "that are reproduced and/or applied to Varsity apparel" as alleged in Paragraph 9 of its complaint, but for uniform designs, which are three-dimensional articles of clothing.

31. Entry into the market for competing cheerleader uniforms has been effectively foreclosed by Varsity's false representations, threats, scare tactics

and other unlawful and anticompetitive actions against lawful participants in the market for cheerleader uniforms.

32. On information and belief, by foreclosing competition through unlawful actions, Varsity has prevented competitors from selling cheerleader uniforms in the marketplace and deceived competitors and the marketplace by overstating IPC's rights with respect to the scope of its copyright and trademark protection.

33. Indeed, the injury to the marketplace and its participants, with the exception of Varsity, is severe and due in large part, on information and belief, to the unlawful and anticompetitive behavior of Varsity and its misleading and anticompetitive scheme to suppress competition in the market for cheerleader uniforms.

34. As a result of the illegal and anticompetitive actions of Varsity, competition in the market for cheerleader uniforms has been restrained in violation of the Lanham Act. Therefore, competitors such as Star and customers in the market for cheerleader uniforms have been injured by reason of Varsity's illegal and anticompetitive conduct.

Counterclaim I
For Declaratory Judgment That The Copyrights In Issue Are Void And Unenforceable, Varsity Has Made Fraudulent Representation To The Copyright Office, Varsity Has Failed To Meet The Requirements For Copyright Registration And Varsity Has Committed Copyright Misuse.

35. Star repeats and re-alleges the preceding paragraphs 1-34 as if fully recapitulated and recited here.

36. Star seeks a declaratory judgment that the registrations of the copyrights in issue are void and unenforceable because of lack of originality of the Varsity designs, Varsity's inequitable conduct by making fraudulent misrepresentations to the Copyright Office to obtain their registrations, and the copyrighted designs fail to meet the requirements for copyright registration such as originality, lack of functionality and for failure of the Varsity designs elements to be physically or conceptually separable from its uniforms and for copy right misuse as further stated herein.

Counterclaim II
For Compensatory, Exemplary, Punitive Damages and Attorneys Fees Based on Violation of 15 U.S.C. §2 Monopolizing Trade and 15 U.S.C. §15 Suits by Persons Injured.

37. Star repeats and re-alleges the preceding paragraphs 1-36 as if fully recapitulated and recited here.

38. Varsity has developed, or is in great danger of imminently developing, monopoly power in the

relevant market for cheerleader uniforms with the ability to control pricing and exclude competitors from entering its marketplace to compete with it.

39. Varsity has well over a 50%-share of the relevant market, and it is conservatively estimated to be in excess of at least 70% now, and rapidly growing, as a result of Varsity's wrongful anti-competitive behavior.

40. Varsity has obtained its dominant share of the relevant market, has maintained and expanded it by intentionally, knowingly and willfully buying up smaller competitors and making false representations to the Copyright Office to facilitate their registration of an extensive base of copyrighted designs all-the-while withhold the functional attributes and the utility inherent and pervasive in its designs as required to manufacture and successfully sell cheerleader uniforms.

41. As a consequence of all the aforesaid wrongful and anti-competitive conduct of Varsity, the counterclaimant Star has suffered three million and three hundred thousand dollars ($3,300,000) in damages, the costs of this litigation including its attorney's fees for which it now seeks compensation as well as exemplary and statutory treble damages and such other awards and further relief that the Court deems just and proper.

Counterclaim III
For Violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125

42. Star repeats and re-alleges the preceding paragraphs 1-41 as if fully recapitulated and recited here.

43. Varsity's anti-competitive behavior as described herein is a violation of the Lanham Act.

44. Varsity has established and continues to perpetuate a scheme to keep competitors in the market for cheerleader uniforms (articles of clothing) from effectively competing with Varsity.

PRAYER FOR RELIEF

Wherefore, Defendant/Counterclaimaint Star asks the court for an order granting judgment in its favor on all the above stated causes of action, dismissal with prejudice of the entire complaint of Plaintiff/Counterdefendant, Plaintiff/Counterdefendant be enjoined from asserting its copyrights to prevent competitors from manufacturing competing cheerleader uniform designs, an award of three million and three hundred thousand dollars ($3,300,000) in damages, the costs of this litigation including its attorney's fees for which it now seeks compensation as well as exemplary and statutory treble damages and such other awards and further relief that the Court deems just and proper.

Defendant and Counterclaimant Star Athletica, L.L.C., hereby demands a trial by jury on all triable issues.

Respectfully submitted,

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[filed May 5, 2011]

Exhibit B to Star Athletica's Response in Opposition to Motion to Dismiss Counterclaim

[filed July 27, 2011]

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January 28, 2009

Copyright RAC Division
P.O. Box 71380
Washington, DC 20024-1380

Re: Correspondence Number 1-26RI9O
FIRST RECONSIDERATION

Dear Sir or Madam:

In response to the Copyright Office's letter of November 10, 2008 ("November 10 Letter"), a copy of which is attached as Exhibit A, we respectfully submit this request for reconsideration of the Office's refusals to register the following six designs created by Varsity Brands, Inc. ("Applicant"):

043 (Exhibit B);

0410 (Exhibit C);

538 (Exhibit D);

529 (Exhibit E);

801 (Exhibit F); and

644 (Exhibit G).

The November 10 Letter states that Applicant's six works are not registrable because "they lack the authorship necessary to support a copyright claim." However, there is no indication, apart from a general citation to *Feist v. Rural Telephone Serv. Co.*, of what standard or test was applied in refusing registration.

It is thus impossible to determine "whether or how the [refusal to register] harmonizes with prior court rulings on the creativity threshold." *Atari Games Corp. v. Oman*, 888 F.2d 878, 884 (D.C. Cir. 1989) ("*Atari I*"), *subseq. proceeding*, 979 F.2d 242 (D.C. Cir. 1992). It does not.

Moreover, as will be shown below, the refusal to register Applicant's copyright claims in these works is plainly *not* "consistent with earlier pronouncements of the Copyright Office," *Atari I*, 888 F.2d at 882, with regard to designs that are impossible to differentiate from the works at issue here in terms of the artistic or graphic authorship displayed.

In fact, the Office has registered copyright claims in numerous comparable designs created by Applicant and its subsidiaries NSG Corporation and Varsity Spirit Fashions & Supplies, Inc.—and recently reversed a bulk refusal to register a number of such designs under circumstances identical to the present case in all relevant respects.

In that matter (Control Number 61-417-6927(C)), the Office initially refused applications submitted by Applicant's subsidiary NSG Corporation to register copyright claims in 38 of its original designs. *See* Letter Ruling dated November 17, 2006 (Exhibit H).

In response to Applicant's First Reconsideration request, the Office reversed that initial refusal, and notified Applicant of the Office's "decision to register the design appearing on the surface of each work." As the Copyright Office found, each of Applicant's 38 visual works then at issue

> contains a sufficient, although minimal, amount of original and creative artistic or graphic authorship in the treatment and arrangement of the preexisting elements coupled with their coloring on the surface of each work that may be regarded as copyrightable and, therefore, support a copyright registration.

October 19, 2007 Letter Ruling of Virginia Giroux-Rollow, Esq., Attorney-Advisor, Registration and Recordation Program (Exhibit I). The law and the reasoning that supported the registration of the 38 works at issue in Matter No. 61-417-6927(C) apply with equal force in support of the registration of the six designs here.

Applicant devotes substantial resources to creating original designs to appeal to its customers. In a similar context the Second Circuit stated:

> We can surmise that in the highly competitive, billion-dollar doll industry, getting the doll's face and expression exactly right is crucial to success. Mattel's evidence showed that it frequently produces revisions and adjustments to the particular realization of the Barbie face in an effort to continue to appeal to its young customers, as their tastes change

> with time. It is entitled by its copyright not to have its design copied by competitors.

Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d 133, 136-37 (2d Cir. 2004). The selection and arrangement of visual forms and elements in Applicant's designs, like Mattel's revisions and adjustments of the facial features of a Barbie doll, are careful attempts to get the designs "exactly right." And like an original arrangement of the standard features of a doll face, each of Applicant's designs "involve whatever minimal creativity or originality is needed to satisfy the requirement of authorship." *Id.* at 135.

DISCUSSION

1. THE NOVEMBER 10 LETTER APPLIED NO ARTICULABLE STANDARD

For purposes of copyright registration, the term "original" means only that a work "owes its origin" to its author and was not copied from another work; "authorship" means only a "minimum amount of original creative expression." Compendium II, 202.01 (1984). Applicant's designs are clearly original works of authorship by this definition. As the U.S. Supreme Court held in *Feist*, "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be." *Feist Publications v. Rural Telephone Services*, 449 U.S. 340 (1991). Each of Applicant's works clearly meets *Feist*'s modest standard.

The November 10 Letter is correct in stating that the "question is whether there is sufficient creative

authorship within the meaning of the copyright law and settled case law." November 10 Letter at 1. However, the November 10 Letter does not address any of the case law that defines the applicable standard for determining when a selection and arrangement of graphic elements into an original design is uncopyrightable.

Under that case law it is well-settled that such a design "may be copyrightable even though it is entirely a compilation of unprotectible elements." *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-04 (2d Cir. 1995). As *Feist* recognized, this "extremely low" threshold of original authorship applies to the original combination of otherwise unprotectible elements, and the Compendium II similarly acknowledges that "a design, otherwise original, may be registrable even though it incorporates uncopyrightable standard forms, such as circles and squares." Compendium II 503; *see, e.g., Covington Indus. v. Nichols*, No. 02-8037, 2004 U.S. Dist. LEXIS 6210, at *9 (S.D.N.Y. Apr. 12, 2004) ("a fabric designer may copyright the selection, arrangement, and combination of otherwise unprotected components"). Thus, as the court noted in *Apple Computer, Inc. v. Microsoft Corp.*, 779 F Supp. 133, 136 (N.D. Cal. 1991), *aff'd*, 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995), a "painting composed entirely of geometric forms arranged in an original pattern" is plainly protectible even where each of its individual elements is in the public domain. *See also Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 939 (7th Cir. 1989) (although general concepts of stripes, ellipses and single-side format are not individually protectible, "it is the unique combination of these common elements which form the copy-

righted material"); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001) ("[c]opyright law may protect a combination of elements that are unoriginal in themselves.").

The standard was confirmed recently in *Van Cleef & Arpels Logistics, S.A. v. Landau Jewelry*, 547 F. Supp. 2d 356 (S.D.N.Y. 2008), in which the court held plaintiff's copyright in a four-leaf-clover design to be valid as a matter of law. The court noted that "plaintiffs do not dispute that their copyrighted jewelry designs are composed of common elements in the designs; rather the copyrights are for the design combinations that result from combining those common elements." *Id.* at 364 (quoting *Yurman Design, Inc. v. Golden Treasure. Imps., Inc.*, 275 F. Supp. 2d 506, 515 (S.D.N.Y. 2003)).

And in *Goldberger Doll, supra*, the Second Circuit, clarifying its holding in *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966), held that "the proposition that standard or common features are not protected is inconsistent with copyright law." In *Goldberger Doll* the court held that the specific expression—the shape, and relative size and arrangement—of the eyes, nose and mouth of a *particular* "Barbie" face that Mattel's designers created "involved whatever minimal creativity or originality is need[ed]" to satisfy the authorship requirement. *Goldberger Doll*, 365 F.3d at 135.

A. The November 10 Letter Incorrectly Categorizes the Works as "Items of Clothing"

As a threshold matter, the November 10 Letter characterizes the works at issue as "items of clothing

[which] are considered 'useful articles'"; and finds that "the works contain separable features," but that those separable features "are not copyrightable." November 10 Letter, Exhibit A, at 1 (emphasis original).

The characterization of Varsity's works as "items of clothing" is mistaken. The mistake is material if, as appears to have happened, the resulting imposition of a "separability" requirement led to the application of a higher standard for original authorship than the *Atari III*/*Feist* "distinguishable variation/inevitability" test described below.

The Copyright Act provides that

> the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101 (definition of "pictorial, graphic, and sculptural works").

The Copyright Office and the courts consistently distinguish between copyright protection for the "design of a useful article"—which is subject to the "separability" requirement under the Copyright Act—and copyright in "two-dimensional artwork applied to useful articles, and designs reproduced on textiles, lace and other fabrics; on wallpaper, carpeting, floor tile, wrapping paper, and clothing"—which is not. ECO "Help: Author," available at *http://www.copyright.gov/eco/help-author.html* (emphasis added);

see also, e.g., Copyright Office Factsheet No. FL-103, "Useful Articles" ("A two-dimensional painting, drawing, or other graphic work is still identifiable when it is printed on or applied to useful articles such as textile fabrics, wallpaper, containers, and the like.").

Such a two-dimensional design is not subject to the separability analysis because it is not the design of a useful article but instead may be applied to or appear on a useful article, to which it remains extrinsic. The separability requirement is properly imposed only when copyright protection is claimed for the design of a useful article—such as "the design that graphically sets forth the shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment." M. Nimmer and D. Nimmer, *Nimmer on Copyright* § 2.08(H)(1). Courts have reliably distinguished between such designs "of" useful articles and the two-dimensional designs that may be "on," or applied to, such articles. *See, e.g.*, *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005) ("Nimmer's cogent discussion of the scope of copyright protection in design works breaks the subject into two categories: (1) fabric design and (2) dress design. Fabric designs include patterns or artistic features imprinted onto a fabric or that appear repeatedly throughout the dress fabric. Because one can generally separate the artistic elements of this design from the utility of the wearable garment, *Nimmer on Copyright* states that fabric designs are generally entitled to copyright protection."); *Knitwaves v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) ("clothes are not copyrightable. In contrast, fabric designs, such as the artwork on Knitwaves' sweaters, are considered 'writings' for

purposes of copyright law and are accordingly protectible.").

Varsity's six works are in the nature of "fabric designs, such as the artwork on Knitwaves' sweaters," not clothes. Application of the separability requirement to such works is inconsistent with Copyright Office practice as well as with case law. In the six applications here, as with dozens of previously registered Varsity copyrights, the "work" in which copyright is claimed is the "two-dimensional design" (or "2-dimensional artwork," "fabric design (artwork)" or "design on garment") shown in the deposit copy, and not the design of an item of clothing. The Copyright Office has consistently so recognized. *See, e.g.*, Registration No. VA-1-404-956 for Design WS062RA; Registration No. VA-1-428-698 for Design BB9; Registration No. VA-1-319-227 for Design 9413; Registration No. VA-1-319-222 for Design 971; Registration No. VA-1-411-626 for Design 0724; Registration No. VA-1-319-228 for Design 299A (copies of registration certificates and printouts from the Copyright Office online Public Catalog are attached as Exhibit J).

The Copyright Office's understanding that Varsity's works are works of the visual arts, not clothing designs, is also explicit in the November 17, 2006 Letter Ruling, Exhibit H ("we are assuming that it is the striped fabric pattern that is the subject of these [38] registrations."), and October 19, 2007 Letter Ruling (Exhibit I) (setting forth the Copyright Office's "decision to register the design appearing on the surface of each work.").

Applicant respectfully contends that the application of the proper standard, without resort to the

inapposite "separability" test, will result in the conclusion that "the design appearing on the surface of each work" here is likewise an original two-dimensional design or "design on garment."

2. *ATARI II* SETS THE PROPER STANDARD: DISTINGUISHABLE VARIATION AND INEVITABILITY

Post-*Feist*, the correct standard for determining the copyrightability of visual works is the two-part "distinguishable variation/inevitability" test articulated in Judge (now Justice) Ginsburg's second opinion for the D.C. Circuit in *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992) ("*Atari II*"). The November 10 Letter does not cite or refer to this decision, which reversed the Copyright Office's second refusal to register a very simple early video game called BREAKOUT, consisting of colored squares and rectangles.

Much like Applicant's designs at issue here, the game in *Atari II* was denied registration because it was comprised of "simple geometric shapes and coloring" which "*per se* [were] not copyrightable." 979 F.2d at 243. The Copyright Office concluded that the game screens "both individually and as a whole simply lack[ed] sufficient creativity to make them registrable." *Id.* That stated basis for refusal closely parallels the single conclusory statement in the November 10 Letter here, and the court in *Atari II* found it entirely insufficient. Such a statement merely asserts that the "very low" standard of *Feist* is not met, in the subjective opinion of the examiner, by each of Applicant's six works, without offering any analysis or explanation as to why.

The D.C. Circuit in *Atari II* provided the proper framework for making such an analysis; and it should not have been neglected here. *Atari II* left no doubt that after *Feist*, an independently created visual work need not be "unique" or even "distinctive" to warrant copyright protection, but need only constitute a "distinguishable variation in the arrangement and manner of presentation" of public domain elements. *Atari II*, 979 F.2d at 246, quoting *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 806 (D.C. Cir. 1987); *see Boisson v. Banian, Ltd.*, 273 F.3d 262, 268 (2d Cir. 2001) ("Originality does not mean that the work for which copyright protection is sought must be either novel or unique").

The "distinguishable variation" test was also applied in pre-*Feist* decisions such as *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 199 F.2d 99, 101 (2d Cir. 1951), and *Amplex Mfg. Co. v. ABC Plastic Fabricators, Inc.*, 184 F Supp. 285, 288 (E.D. Pa. 1960). The *Atari II* court held it to be consistent with, and indeed confirmed by, *Feist* and its progeny *Atari II*, 979 F.2d at 246. Thus, *Atari II* holds that the "low threshold" of *Feist* is satisfied by original combinations and arrangements that are mere "distinguishable variations" on prior combinations and arrangements. *Id.*

Accordingly, where an independently created visual work is a distinguishable variation on any prior "arrangement or manner of presentation" of public domain elements, it contains a sufficient quantum of authorship to be copyrightable subject

matter to the extent of the variation. That is the case with each of Applicant's designs here.[1]

In addition to the distinguishable variation standard, which looks to the existence of an author's original contribution, *Atari II* also applies an "inevitability" test, drawn directly from *Feist*, which asks whether the author's distinguishable variation is "so commonplace that [it has] come to be expected as a matter of course" or is "practically inevitable." *Id.*, quoting *Feist*, 499 U.S. at 363. The *Feist* Court found, for example, that an arrangement of names in alphabetical order was "time-honored," "entirely typical" and "devoid of even the slightest trace of creativity." *Feist*, 499 U.S. at 362.

In contrast, in *Atari II* the choices made by the creators of BREAKOUT, such as the use of a square shape for the "ball" and a variable-sized rectangle for the "paddle," were held to be *not* "practically inevitable." Accordingly, since *Feist* itself does not authorize the Copyright Office to disqualify works

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[1] Copyright validity is a separate matter from copyright strength. As the *Atari* court noted,

> the Register may have confused or blended in this case the analytically and operationally separate questions: (1) is a work registrable as one constituting 'copyrightable subject matter,' *see* 17 U.S.C. § 410(a), (b); and (2) what is the extent of copyright protection—solid or thin—due a given 'original work of authorship.' The first question relates to the existence of copyright, the second, to the scope of protection."

Atari I, 888 F.2d at 882; *Atari II*, 979 F.2d at 244 ("The scope (strength or 'thinness') of the protection is a distinct inquiry.") (citing *Feist*, 111 S. Ct. at 1289).

which rise above the "practically inevitable" level, "[i]t is not the Register's task to shape the protection threshold or ratchet it up beyond the minimal creative spark required by the Copyright Act and the Constitution." *Atari II* at 247 Under *Feist* and *Atari II*, that "minimal creative spark" must be found in every instance where an author creates a distinguishable variation which is not "practically inevitable."

Thus, because the makers of BREAKOUT had independently created a "distinguishable variation" on previous combinations and arrangements of colored squares and rectangles, and because their variation was not inevitable or "expected as a matter of course," the *Atari II* court reversed the Copyright Office's refusal to register:

> The rational basis for finding the elements as combined and arranged in BREAKOUT "so commonplace that they have come to be expected as a matter of course," *Feist*, eludes us. It is the Register's duty, as it is ours, to heed the clarifying instruction furnished by the Supreme Court in *Feist*.

979 F.2d at 247 (internal citation omitted). The Supreme Court's "clarifying instruction" does not consist, as was apparently presumed here, in simply defining the requisite level of creativity as "minimal." Instead, as the court recognized in *Atari II*, it requires an analysis of whether the author's choices amount to at least a "distinguishable variation," and whether those choices were minimally creative or "so commonplace that they have come to be expected as a matter of course."

It is respectfully submitted that, had the proper questions been addressed, the examiner would have concluded that the selection and arrangement of graphic elements in each of Applicant's six designs (a) were "distinguishable variations" on other designs, and (b) were not "so commonplace that [they have] come to be expected as a matter of course." Therefore, the conclusion that the designs do not meet *Feist*'s minimal originality threshold is erroneous, and must be reversed.

3. EACH OF APPLICANT'S DESIGNS IS COPYRIGHTABLE UNDER *ATARI II*

None of Applicant's six designs at issue is a "familiar symbol or design"; merely a "basic geometric shape"; or a "mere variation of typographic ornamentation, lettering or coloring"; November 10 Letter at 1; 37 C.F.R. § 202.1(a), and registration cannot properly be denied on that basis. It is true that some of Applicant's designs *incorporate* such matter as geometric shapes and familiar designs.[2]

However, as the line of pre-*Feist* cases relied on by the D.C. Circuit in *Atari II* demonstrates, even "simple" *combinations* and *modifications* of common elements can easily be copyrightable. In *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F. Supp. 285 (E.D. Pa. 1960), for example, the court found that individual pages of a plexiglas-letter-supply catalog were protectible and infringed, notwithstanding that some of the pages contained nothing more

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[2] Similarly, an original and protectible literary work will almost inevitably contain, and indeed be comprised of, unprotectible "words and short phrases." 37 C.F.R. § 202.1(a).

than an arrangement of letters from a public domain typeface against a dark background. Applying the "extremely liberal" standards of copyrightability for works of graphic art, the court reasoned that

> [a]lthough the Egyptian lettering may be but *an arrangement of letters which themselves were undoubtedly part of the public domain*, the *distinguishable variation* in the arrangement and manner of presentation—the dark background, the particular size of the letters, their spacing, their arrangement into three rows—all combined to give the product independent authorship worthy of protection.

Amplex, 184 F. Supp. at 288 (emphasis added). In each of Applicant's designs here, the choice of elements, *and* their "arrangement and manner of presentation," display at least as much copyrightable authorship as the catalog page at issue in *Amplex*.

The D.C. Circuit relied extensively on *Amplex* in *Reader's Digest Ass'n v. Conservative Digest, Inc.*, 821 F.2d 800 (D.C. Cir. 1987), a decision which *Atari II* later characterized as "the circuit's leading decision on authorship based on the arrangement of uncopyrightable elements." *Atari II* at 245. In *Reader's Digest*, the court affirmed an injunction against a magazine called "Conservative Digest" which featured a cover "that strongly resembled the front cover of Reader's Digest in size, shape and graphic design." *Reader's Digest*, 821 F.2d at 802. The Reader's Digest cover design, consisting of an arrangement of "ordinary lines, typefaces and colors," was clearly a copyrightable work of authorship, the court found.

Perhaps even simpler than the works at issue in either *Reader's Digest* or *Amplex*, a 12"x12" decorative architectural room divider panel, made up "entirely of intersecting straight lines and arc lines," was held copyrightable in *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970). In *Tennessee Fabricating* the Fifth Circuit applied a "trivial variation" standard to hold that even a simple filigree design made up of intersecting lines "possessed at least the minimal degree of creativity required for copyright." 421 F.2d at 282 (citing *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951)).

Post-*Feist*, the courts have continued to find that the degree of creativity required to support a copyright in a visual work is extremely modest. For example, in *Lucky Break Wishbone Corp. v. Sears, Roebuck & Co.*, 528 F. Supp. 2d 1106 (W.D. Wash. 2007), the court held that the plaintiff's copyright in a "wishbone" sculpture—derived from the actual "wishbone from his Thanksgiving turkey"—was valid as a matter of law; the court found that, "[r]egardless of the number, or identification, of original or creative elements, there are creative elements in the Lucky Break Wishbone as a result of [plaintiff's] manual alterations" to the public domain natural wishbone. The court found, based on the plaintiff's small adjustments and modifications of the public domain original, that "Lucky Break has met the 'extremely low' standard for 'minimal creativity'" *Lucky Break*, 528 F. Supp. 2d at 1120-1121 (quoting *Feist*, 499 U.S. at 345).

Under the applicable test articulated and applied in those cases as well as *Feist*, each of Applicant's

designs constitutes a copyrightable selection and arrangement of visual forms and elements:

Design 043 (Exhibit B) has a field of solid green topped by an inverted-V-shaped green/white/black multistripe, which intersects and partly obscures the bottom point of a solid wedge of black; the bottom edge of the black wedge is rhymed by a thin "vee" of white at the top. White wedges at the sides.

Design 0410 (Exhibit C) has a solid black field topped, and bordered on either side, by inverted and sideways "shallow-vee" figures comprised of silver/blue/silver multistripes, forming a "W" figure at the top, which gives way to a field of solid blue that topped by a sharp upright "vee" in the same silver/blue/silver multistripe. The spaces formed by the sideways "vees" are divided into fields of black on top and blue below, the opposite configuration to the central figure.

Design 538 (Exhibit D) has a central field of black bordered at the bottom by a gray/white/black multistripe forming a shallow "vee" of which the left-hand leg is horizontal, while the right-hand leg stretches "northeast" at approximately a forty-five degree angle. Below the upward-angled leg of the shallow "vee" is a similarly angled wider white stripe, succeeded by an area of black. The central field of black is bordered on top by an "X" figure formed of the same gray/white/black multistripe that appears at the bottom, with the colors reversed. Above the "X" is a field of white; the wedges at either side of the "X" are subdivided horizontally into approximately equal-sized wedges of black over white.

Design 529 (Exhibit E) comprises a field of red-brown bordered at the top by a shallow inverted "vee" multistripe of gold/red-brown/white, which intersects, and obscures the bottom point of, an upright "vee" of the same multistripe; each leg of the upright "vee" is intersected by a shallow "vee" of the same multistripe. Within the upright "vee" is a field of red-brown; the wedges at either side of the upright "vee" are subdivided horizontally into approximately equalsized wedges of white over yellow

Design 801 (Exhibit F) has a central "shallow M" figure comprised of a white/dark blue/white/ medium blue multistripe, below which is a field of dark blue, and above which is a field of medium blue, topped by a "shallow vee" of the white/dark blue/ white/medium blue multistripe that parallels the central angle of the "shallow M" below. The upper "shallow vee" is abutted on either side by sharper "vees" of a white/medium blue multistripe, with a smaller field of dark blue above.

Design 0644 (Exhibit G) has, at top-center, a diamond or lozenge of white, bordered by a black/ white/pink multistripe. Below the diamond is a field of black bordered on the bottom by by a wider pink/white/black/white/pink multistripe, additional iterations of which intersect the bottom angle of the diamond at approximately 45-degree angles on either side. The top angle of the diamond is intersected by a black stripe that echoes the lower angle, and bordered on either side by fields of pink.

4. THE REJECTIONS CONFLICT WITH NUMEROUS COURT RULINGS, BOTH PRE- AND POST-*FEIST*, ON THE CREATIVITY THRESHOLD FOR GRAPHIC DESIGNS

The rejections of these six designs cannot be "harmonized with prior court rulings on the creativity threshold," *Atari I*, 888 F.2d at 884, under which each of Applicant's six designs clearly displays at least the minimal degree originality needed to meet the threshold. *See, e.g., Concord Fabrics, Inc. v. Marcus Bros. Textile Corp.*, 409 F.2d 1315, 1316 (2d Cir.1969) (treating as subject to copyright protection fabric design consisting "of a circle within a square within a square, with the dimensions of the circles and squares being identical"); *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409, 411 (2d Cir. 1970) (plaintiff's "pansy lace design," although "not what the phrase 'work of art' ordinarily calls to mind, possesses more than the 'faint trace' of originality required"); *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366, 1367-68 (S.D.N.Y. 1969) (finding alterations pursuant to putting public domain design "in repeat" sufficient to support originality and copyright).

Similarly, in *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092 (2d Cir. 1974), the court held that the plaintiff's

> embellishment or expansion of [a design consisting of a strip of crescents with rows of semicircles] "in repeat," so as to broaden the design and thereby cover a bolt of cloth, together with beginning the pattern in a particular way so as to avoid showing an unsightly joint when the pattern is printed

> on textiles on a continual basis, constitutes modest but sufficient originality so as to support [a] copyright.

Id. at 1094.

Numerous cases affirm that designs consisting of original arrangements of stripes and other basic geometric forms are protectible by copyright. *See, e.g., In Design v. Lynch Knitting Mills, Inc.*, 689 F. Supp. 176, 178-79 (S.D.N.Y.) (upholding copyrightability of rhomboid pattern on a sweater), *aff'd*, 863 F.2d 45 (2d Cir. 1988); *Covington Indus. v. Nichols*, No. 02-8037, 2004 U.S. Dist. LEXIS 6210, at *8-*11 (S.D.N.Y Apr. 12, 2004) (granting summary judgment of valid copyright in upholstery fabric design consisting of repeated sequence of red, green, blue and gold horizontal and vertical stripes, with "basket weave" accent that "was commonly used"); *Sunham Home Fashions, LLC v. Pem-America, Inc.*, No. 02-6284, 2002 U.S. Dist. LEXIS 24185, *18-*19 (S.D.N.Y. Dec. 17, 2002) ("Although the idea of a plaid or floral pattern may not of its own be original, the patterns' sizes, shapes, arrangements and colors taken together are original and copyrightable.").

5. THE REJECTIONS ARE AT ODDS WITH PRIOR COPYRIGHT OFFICE ACTIONS ON THE CREATIVITY THRESHOLD FOR GRAPHIC DESIGNS

The rejections of the six designs here cannot reasonably be "harmonized," *Atari I*, 888 F.2d at 884, with the Copyright Office's previous registrations of the copyrights in numerous designs *of Applicant* in which the creative authorship is not meaningfully distinguishable from that embodied in the six

designs rejected here. For example, in 2005 the Office granted (to Applicant's subsidiary Varsity Spirit Fashions & Supplies, Inc.) Registration No. VA-1-319-222 for Design 971; Registration No. VA-1-319-223 for Design 806; Registration No. VA-1-319-224 for Design 981; Registration No. VA-1-319-227 for Design 9413; Registration No. VA-1-319-228 for Design 299A; Registration No. VA-1-319-226 for Design 299B; and Registration No. VA-1-319-225 for Design 949. As the deposit copies (reproduced in Exhibit K) confirm, there is no rational basis on which to conclude that the six designs at issue here display a lesser degree of artistic or graphic authorship than Design 971, Design 806, Design 981, Design 9413, Design 299A, Design 299B and Design 949, the seven designs registered in 2005.

Nor can the rejections be reconciled with the 2006 grant of registrations for 42 comparable designs, the deposit copies for which are reproduced in Exhibit L.[3] As noted above, 38 of the 42 registrations

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[3] Registration No. VA-1-404-953 for Design WH0630A; Registration No. VA-1-404-954 for Design WS0628FA; Registration No. VA-1-404-955 for Design WS0633A; Registration No. VA-1-404-956 for Design WS062RA; Registration No. VA-1-428-450 for Design WS0615A; Registration No. VA-1-428-451 for Design WS0632FA; Registration No. VA-1-428-452 for Design WMD 0631FA; Registration No. VA-1-428-453 for Design WS0629FA; Registration No. VA-1-428-454 for Design WS0627RA; Registration No. VA-1-428-455 for Design WS0625A; Registration No. VA-1-428-456 for Design WS0624FA; Registration No. VA-1-428-457 for Design WS0623A; Registration No. VA-1-428-458 for Design WS0622RA; Registration No. VA-1-428-459 for Design WS0617A; Registration No. VA-1-428-460 for Design WS061A; Registration No. VA-1-428-461 for Design MFBL 065W; Registration No. VA-1-428-462 for Design MFBL0643M;

[Footnote continued on next page]

were granted after the Copyright Office reversed an initial refusal to register, with a specific finding that each design contained sufficient original and creative artistic or graphic authorship to support a copyright registration.

In 2007 the Office granted to Applicant Registration No. VA-1-411-536 for Design 0717; Registration No. VA-1-415-329 for Design 0720; Registration No. VA-1-411-535 for Design 074; Registration No. VA-1-417-427 for Design 078; and Registration No. VA-1-411-626 for Design 0724. The deposit copies for those works, reproduced in Exhibit M, again show that there is no proper basis under

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[Footnote continued from previous page]
Registration No. VA-1-428-463 for Design WS0620A; Registration No. VA-1-428-464 for Design WS0619A; Registration No. VA-1-428-465 for Design WS0618A; Registration No. VA-1-428-466 for Design WH0613A; Registration No. VA-1-428-467 for Design WS0610A; Registration No. VA-1-428-468 for Design WS065FA; Registration No. VA-1-428-469 for Design WH064A; Registration No. VA-1-428-470 for Design WS060A; Registration No. VA-1-428-471 for Design 0646; Registration No. VA-1-428-692 for Design WS0612A; Registration No. VA-1-428-693 for Design 067; Registration No. VA-1-428-694 for Design WS068A; Registration No. VA-1-428-695 for Design WH0614A; Registration No. VA-1-428-696 for Design WS0516A; Registration No. VA-1-428-697 for Design BB10; Registration No. VA-1-428-698 for Design BB9; Registration No. VA-1-428-699 for Design MFBL0515W; Registration No. VA-1-428-700 for Design MFBL0642W; Registration No. VA-1-428-701 for Design WS0640RA; Registration No. VA-1-428-702 for Design WS0638A; Registration No. VA-1-428-703 for Design WS0637A; Registration No. VA-1-428-704 for Design WS0636A; Registration No. VA-1-428-705 for Design WH0634A; Registration No. VA-1-428-706 for Design WH0635A; and Registration No. VA-1-428-707 for Design WS0613A.

the law on which to distinguish the artistic or graphic authorship in the six designs at issue here from the authorship found in Applicant's previously registered works.[4]

It is thus powerfully clear that the rejections here cannot be "harmonize[d] with prior Copyright Office actions on the creativity threshold." *Atari I*, 888 F.2d at 884.

The above-cited cases and numerous others, and the actions of the Copyright Office with regard to numerous works of Applicant and others, over many years, demonstrate that the refusals to register should be reversed. Each of the six designs at issue constitutes an original, copyrightable selection and arrangement of graphic elements. Under the analysis that *Atari II* requires—and not the inapplicable "separability" test—each design is

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[4] The same is true of dozens more of Applicants' and/or its subsidiaries' original designs that were registered, over many years, under Registrations Nos. VA-204-290; VA-204-291; VA-204-292; VA-204-293; VA-204-294; VA-204-295; VA-204-296; VA-204-297; VA-204-298; VA-204-299; VA-204-300; VA-204-301; VA-204-302; VA-204-303; VA-204-304; VA-204-305; VA-204-306; VA-204-307; VA-204-308; VA-204-309; VA-204-310; VA-204-311; VA-204-312; VA-204-313; VA-204-314; VA-204-315; VA-204-316; VA-204-317; VA-204-318; VA-204-319; VA-204-320; VA-204-321; VA-204-322; VA-204-323; VA-204-324; VA-204-325; VA-204-326; VA-204-327; VA-204-328; VA-204-329; VA-204-330; VA-204-331; VA-204-332; VA-204-333; VA-204-334; VA-204-335; VA-204-336; VA-223-012; VA-223-013; VA-223-014; VA-223-015; VA-223-016; VA-223-017; VA-223-018; VA-223-019; VA-223-020; VA-223-021; VA-225-575; VA-225-576; VA-225-577; VA-225-578; VA-225-579; VA-225-580; VA-225-581; VA-225-582; VA-225-583; and VA-225-584.

clearly distinguishable from prior designs, and none is "so commonplace that it has come to be expected as a matter of course." The designs, like "[t]he vast majority of works[,] make the [copyright] grade quite easily." *Atari II*, 979 F.2d at 247. And as the *Atari II* court held, "[i]t is not the Register's task to shape the protection threshold or ratchet it up beyond the minimal creative spark required by the Copyright Act and the Constitution." *Id.*

CONCLUSION

For the reasons set forth above, the initial refusals to register Applicant's copyright claims in the six designs shown in Exhibits B-G should be reversed, and the designs approved for registration as of the date the applications were received by the Copyright Office.

Sincerely,

Thomas Kjellberg

Enclosures:

Reply Sheet
Exhibits A-M
Check for $375

cc: Arlana S. Cohen, Esq.

EXHIBIT A

[Seal] United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington DC 20559-6000
www.copyright.gov

November 10,2008

Thomas Kjellberg
Cowan, Liebowitz & Latman, PC
1133 Avenue of the Americas
New York, NY 10036-6799
United States

Correspondence ID: 1-26RI9O

RE: *043, 0410, 538, 529, 801* and *0644*
Submitted on behalf of Varsity Brands, Inc.

Dear Mr. Kjellberg:

Registration for the above works must be refused because as items of clothing they are considered "useful articles." The articles do not contain any separable features that are copyrightable.

The Copyright law protects pictorial, graphic, or sculptural works, 17 U.S.C. 102(a) (5). Such works include works of artistic craftsmanship insofar as their form, but not their mechanical or utilitarian aspects are concerned. Moreover, the design of a "useful article" is considered a pictorial, graphic, or sculptural work "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. 101. Legislative history confirms that this separability

may be physical or conceptual. H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976).

Therefore, in examining for registration, we must first determine whether a work within the useful article category has any pictorial, graphic, or sculptural authorship that is either physically or conceptually separable from the utilitarian aspects of the article, and then, if it does, whether that authorship is copyrightable.

Although the works you deposited contain separable features, they are not copyrightable.

To be regarded as copyrightable, a work must be original, i.e., find its origin or source with the author and contain a certain amount of creative authorship. In the case of a work of art, a certain minimum amount of pictorial, graphic, or sculptural material in the work must have originated with the author. The determination of whether a work is copyrightable has nothing to do with its aesthetic or commercial value. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). The question is whether there is sufficient creative authorship within the meaning of the copyright law and settled case law. See Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).

Copyright does not protect familiar symbols or designs; basic geometric shapes; words and short phrases such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering or coloring. See 37 C.F.R. §202.1. Further, copyright does not extend to any idea, concept, system, or process which may be embodied in a work. 17 U.S.C. § 102(b).

Because the separable elements of the works you submitted are not copyrightable, we cannot register these claims. The nonrefundable filing fees have been applied to administrative costs.

The design for a useful article may be entitled to protection under federal patent law For information about patent protection, please visit *www.uspto.gov*.

Enclosures:

Reply Sheet

Cirs. 31, 96 Sec. 202.1

[Seal] United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington DC 20559-6000
www.copyright.gov

1-26RI90

Return this sheet if you request reconsideration.

How to request reconsideration:

- Send your request in writing. (It must be received in the Copyright Office not later than three months after the date on the Office's refusal letter.)
- Explain why the claim should be registered or why it was improperly refused.
- Enclose the required fee – see below.
- Address your request to:

  Copyright RAC Division
  P.O. Box 71380
  Washington, DC 20024-1380

Note: To expedite delivery, write "Reconsideration" on the outside of the envelope. Include the Correspondence ID Number (see above) on the first page. Indicate either "First Reconsideration" or "Second Reconsideration" as appropriate on the subject line.

Notification of decision: The Copyright Office will send a written notification of its decision, including an explanation of its reasoning.

First Request for Reconsideration: The Registration and Recordation Program Office considers the first request. If it upholds the refusal, you may submit a second request.

Second Request for Reconsideration: The Copyright Office Board of Review considers the second request. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees), and a third member appointed by the Register. The Board's decision constitutes final agency action.

FEES:

First Request $250
Additional claim in related group $25

Second Request $500
Additional claim in related group $25

Circular 31

Copyright
United States Copyright Office

Ideas, Methods, or Systems

What Is Not Protected by Copyright

Ideas, methods, or *systems* are not subject to copyright protection. Copyright protection, therefore, is not available for ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas, algorithms; or any other concept, process, or method of operation.

Section 102 of the copyright law, title 17, *United States Code,* clearly expresses this principle: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Inventions are subject matter for patents, not copyrights. Under certain circumstances it may be possible to secure patent protection for an invention or an inventive design for an article of manufacture. For general information about the standards and conditions of the patent laws, write to:

Commissioner of Patents and Trademarks
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Or call the Patent and Trademark help line at (800) 786-9199 (TTY: (571) 272-9950). Internet information is available at *www.uspto.gov.*

What Is Protected by Copyright

Copyright protection extends to a description, explanation, or illustration of an idea or system, assuming that the requirements of the copyright law are met. Copyright in such a case protects the particular literary or pictorial expression chosen by the author. However, it gives the copyright owner no exclusive rights in the idea, method, or system involved.

Suppose, for example, that an author writes a book explaining a new system for food processing. The copyright in the book, which comes into effect at the moment the work is fixed in a tangible form, will prevent others from publishing the text and illustrations describing the author's ideas for machinery, processes, and merchandising methods. But it will not give the author any rights to prevent others-from adopting the ideas for commercial purposes or from developing or using the machinery, processes, or methods described in the book.

Electronic Code of Federal Regulations [e-CFR™]

Title 37: Patents, Trademarks, and Copyrights
PART 202-PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

§ 202.1 Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;

(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

(e) Typeface as typeface.

[24 FR 4956, June 18, 1959, as amended at 38 FR 3045, Feb. 1, 1973; 57 FR 6202, Feb. 21, 1992]

Source: GPO Electronic Code of Federal Regulations (e-CFR), Beta Test Site (www.gpoaccess.gov/ecfr/) Data current as of **October 29, 2007.**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,	)	**No. 2:10-cv-02508-BBD-cgc**
Plaintiffs,	)	
v.	)	
STAR ARTHLETICA, L.L.C.,	)	
Defendant.	)	

ORDER

Before the Court is the Motion to Dismiss Defendant's Counterclaims (D.E. #61) filed by Plaintiffs/Counterdefendants Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (collectively "Varsity") pursuant to Fed. R. Civ. P. 12(b)(6). Varsity contends the counterclaims seeking declaratory judgment and alleging violations of the Sherman Act and the Lanham Act should be dismissed as a matter of law because they fail to state a claim upon which relief can be granted. Defendant/Counterplaintiff Star Athletica, L.L.C. ("Star") opposes this motion. For the reasons assigned herein, the Court **GRANTS IN**

PART and **DENIES IN PART** Varsity's Motion to Dismiss.

I. BACKGROUND

Varsity and Star are competitors who manufacture and sell clothing and accessories for cheerleaders. (Answer and Countercomplaint ("CC") ¶¶ 3-5.) On July 9, 2010, Varsity filed a lawsuit in this Court alleging, among other claims, that Star had infringed Varsity's copyrights.[1] (Compl. ¶¶ 13-15.) On May 5, 2011, Star filed an Answer to Varsity's allegations. The Answer included a Countercomplaint, pursuant to Fed. R. Civ. P 13, raising three counterclaims against Varsity—declaratory judgment, violation of § 2 of the Sherman Act, and violation of the Lanham Act. (CC ¶¶ 35-44.) On May 31, 2011, Varsity filed the present motion to dismiss Star's counterclaims.

Star's counterclaims allege that the copyrights Varsity seeks to enforce against Star—for designs applied to cheerleader uniforms—are void and unenforceable. In particular, Star claims Varsity's copyrights lack originality and are not registerable because the designs are not separable from the functional use of the items to which they are applied. According to Star, Varsity also fraudulently misrepresented information provided to the Copyright Office when it applied for the registration

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[1] Varsity also raises claims against Star for violations of the Lanham Act, unfair competition, breach of contract, inducing breach of fiduciary duty, and civil conspiracy. (CC ¶1.)

of the copyrights at issue in this lawsuit. Star also alleges that Varsity has falsely represented its copyrights to competitors and the marketplace to foreclose competition in the cheerleader uniform market that Varsity dominates.

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may bring a motion to dismiss for failure to state a claim, which tests only whether the plaintiff has pleaded a cognizable claim. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). Essentially, it allows the court to dismiss, on the basis of a dispositive issue of law, meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. See, e.g., Nietzke v. Williams, 490 U.S. 319, 326-27 (1989).

To determine whether a motion to dismiss should be granted, the court must examine the Complaint. The Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P 8(a)(2), and it must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). While a Complaint need not present detailed factual allegations, to be cognizable it must provide more than "labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Scheid, 859 F.2d at 436-37. A Complaint must have a factual foundation, and the mere possibility "that a plaintiff might later

establish some set of undisclosed facts to support recovery" is insufficient to survive a 12(b)(6) challenge. Twombly, 550 U.S. at 561 (internal quotation marks and brackets omitted).

In reviewing the Complaint, the court must accept as true all factual allegations in the Complaint and construe them in the light most favorable to the plaintiff. Nietzke, 490 U.S. at 326-27 ("Rule 12(b)(6) does not countenance [] dismissals based on a judge's disbelief of a Complaint's factual allegations."); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983). Where there are conflicting interpretations of the facts, they must be construed in the plaintiff's favor. Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1039-40 (6th Cir. 1991). However, only well-pleaded facts must be taken as true, and the court need not accept legal conclusions or unwarranted factual inferences. Lewis v. ACB Bus. Servs., Inc.,135 F.3d 389, 405 (6th Cir. 1998). When a Complaint does adequately state a claim, it may not be dismissed based on the court's "assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." Twombly, 550 U.S. at 563.

III. ANALYSIS

A. Counterclaim 1 - Declaratory Judgment

In its Countercomplaint, Star seeks a declaration from the court that: 1) the Varsity copyrights are void and unenforceable because the designs lack originality; 2) the Varsity copyrights are void and unenforceable because the designs are not separable from the function of the uniforms; 3) the Varsity

copyrights are void and unenforceable because Varsity made fraudulent misrepresentations to the Copyright Office in order to obtain the copyrights; and 4) Varsity has misused its copyrights. (CC ¶ 36.) The Court examines each subpart of the declaration Star seeks in turn.

1. Failure to Meet Requirements for Copyright Protection – Originality

Varsity argues that Star has not identified how the Varsity designs are unoriginal, and, therefore, Star's counterclaim should be dismissed as a matter of law for failure to state a claim. In its opposition, Star alleges that Varsity "lifts" designs from customers and competitors and then registers them as its original designs. Star's Countercomplaint alleges only that "all of Varsity's copyrights contain elements that are in the public domain." (CC ¶ 23.) That allegation alone is not sufficient to meet the plausibility standard of Iqbal.

A design may be copyrightable even though it contains uncopyrightable elements from the public domain. See Sem-Torq, Inc. v. K Mart Corp., 936 F.2d 851, 855 (6th Cir. 1991) ("A copyrightable compilation can consist mainly or entirely of uncopyrightable elements ... because it is the unique combination of these common elements which form the copyrighted material."). Viewing Star's allegation in the most favorable light, even if Varsity's designs contained elements that are in the public domain, it does not necessarily follow that Varsity's copyrights are void and unenforceable. Star fails to provide any factual support for its allegation that Varsity's designs lack originality. Because Star's Countercomplaint does not sufficiently allege plausible

grounds for a declaratory judgment that Varsity's copyrights are void and unenforceable for lack of originality, the motion to dismiss this claim is granted.

2. Failure to Meet Requirements for Copyright Protection – Designs Are Not Separable

Varsity contends Star's claim for declaratory judgment on this issue should be denied as a matter of law because "the copyright registrations for the Varsity designs are for original two-dimensional designs to be reproduced on or applied to clothing and other cheer-related merchandise; they are not three dimensional uniforms."[2] (Reply Mem. at 2.) A useful article, like a cheerleader uniform, "is copyrightable only to the extent that it incorporates a design element that is physically or conceptually separable from the underlying product." Kohus v. Graco Children's Products, Inc., 2010 WL 3785311,

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[2] Varsity avers that a similar argument against its copyrights has been rejected by another court. See Varsity Brands, Inc. v. J & M Spirit Wear, Inc., 2009 WL 3401182 (S.D.N.Y. Oct. 19, 2009). J & M is similar to this case in that it originates from Varsity bringing a copyright infringement claim against a competitor. In J & M, the court denied the defendant's motion to dismiss Varsity's complaint for the reason the copyrights at issue were invalid because Varsity misled the Copyright Office. The J & M court did not "reject" that defendant's allegations, as Varsity contends. Instead, it noted that at the motion to dismiss stage of litigation it must consider all of Varsity's allegations as true. Finding Varsity had sufficiently pleaded its claims, the J & M court denied the motion to dismiss. It did not reject the legal position of Varsity's opponents but instead said the merits were better suited in a motion for summary judgment after discovery had been completed.

at *2 (S.D. Ohio Sept. 21, 2010) (citing Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 327 (2d Cir. 2005)). "Where 'design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements.'" Id. (quoting Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987)).

Star has alleged that Varsity's copyrighted designs are functional, not separable from Varsity's uniforms, and thus not protectable. At this stage in the litigation, the Court takes Star's allegations as true, and as pleaded they satisfy the Iqbal test to survive a 12(b)(6) motion. While Varsity insists Star misconstrues the nature of Varsity's copyrighted designs, that argument asks the court to make factual determinations not permitted on a motion to dismiss. Varsity's motion to dismiss this aspect of the declaratory judgment counterclaim is denied.

3. Fraudulent Misrepresentations to the Copyright Office

Star claims Varsity made fraudulent representations to the Copyright Office "to facilitate the registration of a broad base of copyrighted designs that cover the functional attributes and the utility required to make and successfully sell cheerleader uniforms." (CC ¶ 9.) Fraud on the Copyright Office can be used to rebut the presumption of a copyright's validity, but it is a heavy burden that requires establishing that: 1) the application for copyright registration is factually inaccurate; 2) the inaccuracies were willful or deliberate; and 3) the Copyright Office relied on them. See Tacori Enters. v. Rego Mfg., 2008 WL 4426343, at *14 (N.D. Ohio

Sept. 25, 2008) (citing Lennon v. Seaman, 84 F Supp. 2d 522, 525 (S.D.N.Y 2000)).

Allegations of fraud are held to a higher pleading standard than ordinary claims. Rule 9(b) of the Federal Rules of Civil Procedure requires a plaintiff to plead a claim involving fraud with particularity. The Sixth Circuit has interpreted this rule as requiring plaintiffs to allege "the time, place, and content of the alleged misrepresentation ...; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." Bennett v. MIS Corp., 607 F.3d 1076, 1100 (6th Cir. 2010) (citing Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 563 (6th Cir. 2003)).

Varsity contends that Star's allegations of fraud do not meet the more stringent pleading standard of Rule 9(b). The Court disagrees. Star alleges that Varsity's applications for the copyright registrations of the designs at issue were factually inaccurate because Varsity misled the Copyright Office on the utility and non-separability of the registered designs relative to the uniforms themselves. (CC ¶¶ 24, 25.) Star alleges the fraudulent intent of the misrepresentations and Varsity's fraudulent scheme. (CC ¶ 25, 26.) By pointing to the Copyright Office's policy regarding the copyrightability of two-dimensional designs versus useful articles (CC ¶¶ 12-17), Star also alleges that the Copyright Office relied on Varsity's misrepresentations. Therefore, the Court finds Star has sufficiently pleaded its counterclaim for a declaratory judgment on this issue, and Varsity's motion to dismiss this subpart of Counterclaim I is denied.

4. Copyright Misuse

Finally, Star seeks a declaration that Varsity has committed copyright misuse. (CC ¶ 36.) To establish copyright misuse, Star must show that Varsity violated antitrust laws, illegally extended its monopoly beyond the scope of the copyright, or violated public policies underlying copyright laws. See Microsoft Corp. v. Compusource Distribs., Inc., 115 F. Supp. 2d 800, 810 (E.D. Mich. 2000) (citing In re Indep. Serv. Orgs. Antitrust Litigation, 85 F. Supp. 2d 1130, 1175 (D. Kan. 2000)). Because the Court finds that Star has sufficiently pleaded a claim for a declaration that Varsity's copyrights are unenforceable, Star has sufficiently alleged that Varsity violated public policies underlying the copyright laws. Accordingly, Varsity's motion to dismiss this portion of the requested declaratory judgment is denied.

5. Summary

In sum, the Court grants Varsity's motion to dismiss Counterclaim I as it applies to Star's allegation that the Varsity copyrights lack originality. The Court denies Varsity's motion with respect to the other elements of Star's counterclaim for declaratory judgment.

B. Counterclaim 2 – Violation of § 2 of the Sherman Act

Section 2 of the Sherman Act prohibits monopolization and the attempt to monopolize. 15 U.S.C. § 2. To prove monopolization, a plaintiff must show both "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a

superior product, business acumen, or historic accident." U.S. v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). For an attempted monopolization claim, a plaintiff must show: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc v. McQuillan, 506 U.S. 447, 456 (1993).

A plaintiff's first step in alleging a claim under § 2 of the Sherman Act is to define the relevant product market.[3] See Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002); Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 969 (W.D. Tenn. 2004). The definition of the relevant product market, which includes both a product market and a geographic market, enables the court "to assess whether the defendant has monopoly power in that market, what the area of competition is, and whether the allegedly unlawful acts have anticompetitive effects in that market." Cupp, 310 F. Supp. 2d at 969. In the Sixth Circuit,

> The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to

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[3] The definition of the relevant product market is a component of the "dangerous probability of monopolization" prong of an attempt to monopolize claim. See Spectrum Sports, 506 U.S. at 456 ("In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.").

> or (2) available substitutes for the defendant's product or service. ... [R]easonable interchangeability may be gauged by (1) the product uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity), that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service.

White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983) (citation omitted).

Star defines the relevant market for its counterclaim as "the market for cheerleader clothing and related accessories that are sold primarily to schools with sports teams such as public schools, middle schools, high schools, colleges and universities, professional and semi-professional sports teams, and sports clubs and organizations within the United States." (CC ¶ 6.) Varsity argues that Star's market definition is too broad. In particular, Varsity suggests Star's definition is similar to the definition the court rejected in Cupp.[4]

In Cupp, the plaintiff, a full-service hair salon, defined the relevant product market as "exclusive salon hair care products ... those sold exclusively through salons under the advice of professional hair

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[4] Varsity does not argue that Star's geographic market definition—the United States—is insufficient.

stylists." 310 F. Supp. 2d at 970-71. The court rejected this definition, explaining:

> The description "hair care products" is itself so vague that it leaves the Court at a loss as to what sorts of products to include. As the Alberto-Culver Defendants point out, those products could include shampoos, cosmetics, hair rinses, styling aids, or something more. Each category considered could expand the market further, and Plaintiff's allegations do not indicate how broad the category is.

Id. at 971-72. Varsity posits that "cheerleader clothing and related accessories" is similarly vague because it "could include cheerleading uniforms, jackets, athletic shoes, shoelaces, socks, pom-poms, hair accessories, megaphones, signs, camp wear, warm-up suits, body-liners, undergear, bags, backpacks, etc." (Mem. in Supp. at 12.)

Star contends its definition is adequate, pointing to the definition offered in Michael Anthony Jewelers, Inc., v. Peacock Jewelry, Inc., 795 F. Supp. 639, 646 (S.D.N.Y. 1992). In Michael Anthony Jewelers, the court found a market definition of "diamond cut gold charms in the United States" sufficient, rejecting the defendant's proposed broader definition that included "non-diamond-cut gold charms or at least other inexpensive charms made of silver." Id.

The Court finds Star has not sufficiently defined the relevant product market for its Sherman Act counterclaim. Star's definition is more similar to the

definition in Cupp than the definition in Michael Anthony Jewelers. Star fails to identify the products that are identical to or available substitutes for Varsity's products. The various garments and paraphernalia used by cheerleaders renders "the market for cheerleader uniforms and accessories ... within the United States" too vague for the Court to determine the precise contours of the relevant market at issue. For instance, accessories could refer to clothing products like socks and shoes or non-clothing products like pom-poms and megaphones. As the court noted in Cupp, "Plaintiffs allegations do not indicate how broad the category is." 310 F. Supp. 2d at 972. Since Star has not sufficiently defined the relevant product market, it cannot overcome Varsity's 12(b)(6) motion. Therefore, Counterclaim II of Star's Countercomplaint must be dismissed.[5]

C. Counterclaim 3 – Violation of Lanham Act

Varsity contends Star's counterclaim for violations of the Lanham Act fails as a matter of law. Varsity offers arguments for dismissing claims brought by Star under both parts of Section 43(a) of the Lanham Act—15 U.S.C. § 1125(a)(1)(A) and 15 U.S.C. § 1125(a)(1)(B). In its opposition, however, Star asserts only that it sufficiently pleaded a false advertising claim under § 1125(a)(1)(B). Accordingly, to the extent the Countercomplaint attempts to raise a claim under § 1125(a)(1)(A), the Court construes Star's Opposition as waiving that claim.

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[5] Because Star has not adequately defined the relevant product market, the Court need not address the other elements of a monopolization or attempt to monopolize claim.

To prove a claim for false advertising under § 1125(a)(1)(B), a plaintiff must establish:

> (1) the defendant has made false or misleading statements of fact concerning his product or another's; (2) the statement actually or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some causal link between the challenged statement and harm to the plaintiff.

Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc., 270 F.3d 298, 323 (6th Cir. 2001). Star insists it has pleaded each element of this test.

Star has sufficiently alleged the first three elements of the Herman Miller test. First, Star's Countercomplaint alleges that Varsity is making false representations to competitors and the marketplace regarding the trademark and copyright protections of its items. (CC ¶ 30.) Second, Star alleges that Varsity's statements deceived competitors and the marketplace, which satisfies the second element. (CC ¶ 32.) Third, Star alleges that Varsity's false representations foreclosed competition and entry into the market. (CC ¶ 31.)

But Star has not alleged the final two elements of the Herman Miller test. Star's complaint is devoid of any allegation that Varsity's catalogs, as the misleading advertisement, were introduced into

interstate commerce. Nor has Star alleged a causal link between its harm and the misleading statements. In Star's Opposition, it insists a causal link exists because "Star's customers are stating that they have reversed their decision to buy from Star, specifically because of Varsity's statement that it has copyrights for uniform designs over which it is in a lawsuit with Star and customers should be worried about whether Star will be around in a year." (Opposition at 17.) This information is not included in Star's Countercomplaint, however. In fact, the Countercomplaint does not contain any allegation suggesting customers are leaving Star because of Varsity's misleading statements in its catalog. Therefore, Star has not alleged the fourth and fifth elements of the Herman Miller test. Because Star has not properly alleged all elements of the Herman Miller test, Counterclaim III for false advertising under the Lanham Act must be dismissed.

IV. CONCLUSION

For the reasons assigned above, the Court **GRANTS** Varsity's Motion to Dismiss with respect to Star's claim for a declaratory judgment that Varsity's copyrights are void for lack of originality as well as Counterclaims II and III. Those counterclaims are hereby **DISMISSED**. Varsity's motion is **DENIED** with respect to the other parts of the declaration Star seeks in Counterclaim I.

IT IS SO ORDERED, this 31st day of October, 2011.

/s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

BAKER DONELSON
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& BERKOWITZ, PC

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May 10, 2011

Via Certified Mail# 7007 3020 0000 8302 8783
Return Receipt Requested

It's Greek To Me, Inc.
520 McCall Road
Manhattan KS 66505
ATTN: President

Re: Copyright Infringement

Dear Sirs:

This firm represents Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc., 6745 Lenox Center Court, Suite 300, Memphis, Tennessee 38115 (collectively "Varsity").

Varsity is the owner of all right, title and interest in and to certain garment designs, each of which is an original creation and constitutes copyrightable subject matter, protected the United States Copyright Act.

We have reviewed It's Greek to Me, Inc.,'s ("GTM") cheerleading uniforms online at

gtmsportswear.com and determined that certain designs displayed therein infringe the copyrights of Varsity:

1. GTM's design "Double V Cheerleading Uniform," Adult UN157 Youth YUN157, including the "Double V Shell," UN107, infringes Varsity Design 0733.

2. GTM's design "Pyramid Shell & Notch Front Skirt Cheerleading Uniform," Adult UN152 Youth YUN152, infringes Varsity Design 043 registered as VA 1-653-819.

3. GTM's design "Pike Shell & Triple Pleat Skirt Cheerleading Uniform," Adult UN162 Youth YUN162, infringes Varsity Design 074 registered as VA 1-411-535.

4. GTM's design "Pike Shell & Colorblocked 3-Pleat Skirt Cheerleading Uniform," Adult UN112 Youth YUN112, infringes Varsity Design 074 registered as VA 1-411-535.

The above actions constitute copyright infringement, in violation of 17 U.S.C. §§ 501, et seq.

The U.S. Copyright Act grants exclusive rights to a copyright owner, including the right of reproduction and the right of distribution. Furthermore, any person or entity that violates any of these exclusive rights is an infringer. The Copyright Act provides copyright owners with various remedies for infringement, including awards of actual damages, statutory damages, and disgorgement of ill-gained profits, injunctions, seizures and destruction of infringing goods. If the court determines that the infringement has been willful, statutory damages may be increased to $150,000.00 per work infringed. The court

may also award the copyright owner costs and attorney's fees. See 17 U.S. C.§§ 101, et seq.

Based upon the foregoing, Varsity demands that GTM Sportswear:

1. Immediately cease the manufacture, distribution, sale and advertising of the above infringing garments or any other goods which infringe the copyrights of Varsity;

2. Within fifteen (15) days of the date of this letter, provide an accounting to Varsity of the quantity and value of infringing garments manufactured by you to date;

3. Within fifteen (15) days of the date of this letter, provide an accounting to Varsity of the quantity and value of infringing garments sold by you to date;

4. Within fifteen (15) days of the date of this letter, provide a complete explanation of how the copyrighted designs of Varsity were copied, including the names, addresses, telephone numbers and the names of each contact at each of the designers and manufacturers of GTM Sportswear;

5. Within fifteen (15) days of the date of this letter, certify in writing to Varsity that all infringing garments have been destroyed;

6. Within fifteen (15) days of the date of this letter, remove all images containing infringing designs from the above web site, and destroy any catalogues, photographs or other materials displaying the infringing designs;

7 Within fifteen (15) days of the date of this letter, recall from third parties any catalogues, photo-

graphs or other materials displaying the infringing designs;

8. Promptly after your delivery of the information requested above enter into a settlement agreement with Varsity to provide it with compensation for the infringement of its copyrights together with its attorney fees; and

9. Consent to the entry of a permanent injunction against the further infringement of any of the copyrights of Varsity.

Unless you take the above corrective measures within fifteen (15) days of the date of this letter, we are prepared to take all action available under the law to prevent any further copyright infringement and damage to Varsity. Additionally, we are continuing to investigate further copyright infringement and damage to Varsity. thus, the above list is not to be considered a conclusive report of infringing items.

Finally, be advised that nothing contained in this letter may be deemed to constitute a waiver or relinquishment of any of Varsity's rights and remedies, all of which are hereby expressly reserved.

Very truly yours,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC

Grady M. Garrison

GMG:sbg

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc.,	)	Civil Action No. 10-cv-2508
Plaintiffs,	)	
v.	)	
Star Athletica, LLC,	)	
Defendant.	)	

PLAINTIFFS' RESPONSES TO DEFENDANT'S SECOND SET OF REQUESTS FOR ADMISSION

In response to Defendant Star Athletica, LLC's ("Star" or "Defendant") Second Set of Requests for Admission to Plaintiffs Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (collectively, "Varsity" or "Plaintiffs"), Plaintiffs respond as follows:

* * *

Request No. 118: Plaintiffs have included copyright notices in its catalogs from 1999 through 2009 for uniform designs.

Response to Request No. 118: Varsity objects to this request as vague, ambiguous and/or unintelligible. Subject to and without waiving the foregoing objections, Varsity admits the request.

Request No. 119: The following text appears on the inside of the back cover of the 1999 Varsity Spirit Fashions Catalog:

> "Uniform Design © 1999 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 119: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 1999 catalog of Plaintiffs.

Request No. 120: The following text appears on page 181 of the 2000 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2000 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 120: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2000 catalog of Plaintiffs.

Request No. 121: The following text appears on page 193 of the 2001 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2001 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 121: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2001 catalog of Plaintiffs.

Request No. 122: The following text appears on page 193 of the 2002 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2002 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 122: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2002 catalog of Plaintiffs.

Request No. 123: The following text appears on page 205 of the 2003 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2003 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission form Varsity Spirit Corporation."

Response to Request No. 123: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2003 catalog of Plaintiffs.

Request No. 124: The following text appears on the ordering instruction sheet attached to the mailing envelope that is inserted between pages 200 and 201 of the 2004 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2004 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 124: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2004 catalog of Plaintiffs.

Request No. 125: The following text appears on page 207 of the 2005 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2005 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 125: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2005 catalog of Plaintiffs.

Request No. 126: The following text appears on page 217 of the 2006 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2006 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 126: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2006 catalog of Plaintiffs.

Request No. 127: The following text appears on page 229 of the 2007 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2007 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 127: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2007 catalog of Plaintiffs.

Request No. 128: The following text appears on page 229 of the 2008 Varsity Spirit Fashions Catalog:

> "Uniform Design ©2008 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 128: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2008 catalog of Plaintiffs.

Request No. 129: The following text appears on page 229 of the 2009 Varsity Spirit Fashions Catalog:

> "Uniform Design © 2009 Varsity Spirit Corporation. All rights reserved. The original uniform designs depicted in this catalog are the exclusive property of Varsity Spirit Corporation. They may not be reproduced or manufactured without written permission from Varsity Spirit Corporation."

Response to Request No. 129: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2009 catalog of Plaintiffs.

Request No. 130: The following text appears on page 190 of the 1999 Varsity Spirit Fashions Catalog:

> "NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 130: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 1999 catalog of Plaintiffs.

Request No. 131: The following text appears on page 179 of the 2000 Varsity Spirit Fashions Catalog:

"NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 131: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2000 catalog of Plaintiffs.

Request No. 132: The following text appears on page 191 of the 2001 Varsity Spirit Fashions Catalog:

"NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 132: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2001 catalog of Plaintiffs.

Request No. 133: The following text appears on page 191 of the 2002 Varsity Spirit Fashions Catalog:

"NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 133: Varsity objects to the characterization of "Varsity Spirit Fashions

Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2002 catalog of Plaintiffs.

Request No. 134: The following text appears on page 203 of the 2003 Varsity Spirit Fashions Catalog:

> "NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 134: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2003 catalog of Plaintiffs.

Request No. 135: The following text appears on page 201 of the 2004 Varsity Spirit Fashions Catalog:

> "NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 135: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2004 catalog of Plaintiffs.

Request No. 136: The following text appears on page 207 of the 2005 Varsity Spirit Fashions Catalog:

> "NOTE: When changing, the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 136: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2005 catalog of Plaintiffs.

Request No. 137: The following text appears on page 217 of the 2006 Varsity Spirit Fashions Catalog:

> "NOTE: When changing the stripe style, stripe width must stay the same as is shown on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 137: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2006 catalog of Plaintiffs.

Request No. 138: The following text appears on page 229 of the 2007 Varsity Spirit Fashions Catalog:

> "NOTE: When changing the stripe style, stripe width must stay the same as is shown

on the uniform. Cannot add/delete striping to existing styles."

Response to Request No. 138: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2007 catalog of Plaintiffs.

Request No. 139: The following text appears on the inside of the front cover of the 2009 Varsity Spirit Fashions Catalog:

> "Every Varsity uniform is an original copyrighted design and bears the distinctive Varsity trademarked logo. Each design must pass rigorous standards for style, construction, fit, and performance before it can be called a Varsity original."

Response to Request No. 139: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2009 catalog of Plaintiffs.

Request No. 140: The following text begins on the inside of the front cover of the 2010 Varsity Spirit Fashions Catalog and continues to the next page:

> "It was the 70s, and a new breed of cheerleader was emerging dynamic, athletic, entertaining and an ambitious young company began to design cheerleading uniforms that expressed their vitality and individuality.

> Like the spirit leaders and their new high-energy skills, the cheer designs were sleek, athletic, exciting and offered greater flexibility and strength for the more rigorous routines. It was the perfect teaming of form and function.
>
> It was the beginning of Varsity Spirit Fashions.
>
> Today, Varsity Spirit Fashions remains true to its beginnings with original, copyrighted designs that excel in style and performance."

Response to Request No. 140: Varsity objects to the characterization of "Varsity Spirit Fashions Catalog" as vague and ambiguous. Subject to and without waiving the foregoing objections, Varsity admits that the quoted text appears in the 2010 catalog of Plaintiffs.

Respectfully submitted,

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EXHIBIT 1
To Plaintiffs' Reply In Support of Motion to Strike Defendant's Supplemental Expert Report of Antonio Sarabia II
[filed August 14, 2012]

In The Matter Of:
Varsity Brands vs.
Star Athletica

Kerry Leake
April 9, 2012

Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
901-523-8974

Original File 16145cc.txt

A. No.

Q. Are you aware of any instances in which you believe Varsity has copied the design on a uniform from a competitor?

Varsity copied a design from a competitor?

Q. Yes.

A. Yes.

Q. In what instances are you aware of?

A. Several instances.

Q. When you say several, how many are you referring to?

A. When I was head of production, I used to do at least 300 custom designs a year from competitors' catalogs.

Q. And when you were head of production, remind me again, when did you stop performing that job duty at Varsity?

A. 2000.

Q. Are you aware of any instances, after 2000, where Varsity has copied the design on a uniform of a

competitor?

A. No, not personally.

Q. So you don't have any knowledge of Varsity copying design on uniforms of competitors after 2000?

A. No.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC.,
VARSITY SPIRIT CORPORATION and
VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,

Plaintiffs,

v. No. 10-cv-02508-RHC-cgc

STAR ATHLETICA, L.L.C.,

FILED UNDER SEAL

Defendant.

STAR ATHLETICA'S STATEMENT OF UNDISPUTED FACTS FOR MOTION FOR SUMMARY JUDGMENT

Star Athletica, L.L.C. ("Star") respectfully submits that the following facts are undisputed and material to its motion for summary judgment:

1. The plaintiffs in this case are Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (hereinafter collectively referred to as "Varsity"). Varsity is engaged in the business of developing designs and manufacturing and selling apparel and accessories for use in cheerleading and other activities. (Complaint ¶¶ 8, 16). (See Joint Statement of Undisputed Facts ¶ 1).

2. Star Athletica, LLC ("Star") is a limited liability corporation organized on January 25, 2010, and

existing under the laws of the State of Missouri with its principal place of business at 582 Goddard Avenue, Chesterfield, Missouri 63005. (See Exhibits 1 and 2 to Deposition of William Liebe ("B. Liebe Dep."): Articles and Certificate of Organization of Star Athletica, LLC; B. Liebe Dep. at 13:4-10.) (See Joint Statement of Undisputed Facts ¶ 2).

3. Star has an additional facility in Horn Lake, Mississippi. (B. Liebe Dep. at 38:18-22.) Order entry, customer support, inventory storage, computerized cutting and direct-to-print manufacturing occur at the Horn Lake office of Star Athletica. (B. Liebe Dep. at 124:15-125:25.) (See Joint Statement of Undisputed Facts ¶ 3).

4. Bill Liebe is the manager of Star. (See B. Liebe Dep. at 33:8-16.) (See Joint Statement of Undisputed Facts ¶ 4).

5. Star markets and sells football uniforms and accessories, baseball uniforms, basketball uniforms, lacrosse uniforms and cheerleading goods, including shells, shell tops, warm-ups, skirts, accessories, poms, and rain jackets. (B. Liebe Dep. at 49:1 14.) (See Joint Statement of Undisputed Facts ¶ 5).

6. Bill Liebe, as of the time of his deposition, testified Star did not sell or make profits from any of its cheerleader uniform women's shell tops at issue in this case. (Exhibit 37 of B. Liebe Dep., Star08087, B. Liebe Dep. at 249:25-250:11). (See Joint Statement of Undisputed Facts ¶ 6).

7 The five (5) copyright registrations and the corresponding copyright deposits at issue in this case are as follows (Complaint ¶¶ 11, 28, 35, 41, and 48

and First Amendment To Complaint ¶55) (See Joint Statement of Undisputed Facts ¶ 7):

VA 1-675-905 (Varsity Design 0815)	
VA 1-319-228 (Varsity Design 299A)	

VA 1-417-427 (Varsity Design 078)	
VA 1-411-535 (Varsity Design 074)	

VA 1-319-226 (Varsity Design 299B)	

8. Pictures of Varsity's physical cheerleading uniforms with corresponding style numbers WS0815RA, WS299A, WS078FA, WS074RA, and WS299B are shown below (These physical cheerleading uniforms were marked as Exhibits 10-14 at the deposition of Kimberly Williams) (See Joint Statement of Undisputed Facts ¶ 46):

Williams Ex. 10
WS0815RA

Williams Ex. 11
WS299A

Williams Ex. 12
WS078FA

Williams Ex. 13
WS074RA

Williams Ex. 14
WS299B

9. Copyright Registration No. VA 1-417-427 is for a two-dimensional artwork and the deposit attached is an image of the front and back of a cheerleader uniform. (Complaint Exhibit 1; Deposition of Frances Harder ("Harder Dep.") 201:4-9).

10. Copyright Registration No. VA 1-675-905 is for a two-dimensional artwork and the deposit attached is an image of the front and back of a cheerleader uniform. (Complaint Exhibit 3; Harder Dep. at 201:4-9).

11. Copyright Registration No. VA 1-319-226 is for a photograph and the deposit attached is an image of the front and the inside of the back of a cheerleader uniform. (Complaint Exhibit 5; Harder Dep. at 201:4-9).

12. The deposit for Copyright Registration No. VA 1-319-228 is for a photograph and the deposit attached is an image of the front and the inside of the back of a cheerleader uniform. (Complaint Exhibit 7; Harder Dep. at 201:4-9).

13. Copyright Registration No. VA 1-411-535 is for an image and the deposit attached is an image of the front of a cheerleader uniform. (First Amendment to Complaint Exhibit 9; Harder Dep. at 201:4 9).

Varsity Design 078

14. A copy of Copyright Registration VA 1-417-427 ("CR '427") is attached as Exhibit 6 to Williams Deposition. A copy of the deposit material for CR '427 is attached as Exhibit 6 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '427 are attached collectively hereto as Exhibit A. (See Joint Statement of Undisputed Facts ¶ 8).

15. The deposit material for CR '427 is a copy of a sketch. (See Joint Statement of Undisputed Facts ¶ 9).

16. The effective date stated on CR '427 is May 21, 2007. (See Joint Statement of Undisputed Facts ¶ 10).

17 The title of CR '427 is "Design Number 078" and CR '427 corresponds with Varsity design 078 (hereinafter referred to as "Varsity Design 078"). (See Joint Statement of Undisputed Facts ¶ 11).

18. CR '427 provides that the nature of the work is "2-dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 12).

19. CR '427 provides that the nature of the authorship is "2-Dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 13).

20. U.S. Supplementary Copyright Registration No. VA 1-432-737 is also directed to Varsity Design

078 and lists Varsity Spirit Corporation as the owner of the CR '427. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1-432-737 is attached hereto as Exhibit B. (See Joint Statement of Undisputed Facts ¶ 14).

21. According to Kim Williams and Amy Bailey, employees of Varsity, they sketched Varsity Design 078. (See Deposition of Amy Bailey ("Bailey Dep. ") at 158:5-15.) (See Joint Statement of Undisputed Facts ¶ 15).

Varsity Design 0815

22. A copy of Copyright Registration VA 1-675-905 ("CR '905") is attached as Exhibit 2 to Williams Deposition. A copy of the deposit material for CR '905 is attached as Exhibit 2 to the Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '905 are attached collectively hereto as Exhibit C. (See Joint Statement of Undisputed Facts ¶ 16).

23. The deposit material for CR '905 is a copy of a sketch. (See Joint Statement of Undisputed Facts ¶ 17).

24. The effective date stated on CR '905 is May 12, 2008. (See Joint Statement of Undisputed Facts ¶ 18).

25. The title of CR '905 is "0815" and CR '905 corresponds with Varsity design 0815 (hereinafter referred to as "Varsity Design 0815"). (See Joint Statement of Undisputed Facts ¶ 19).

26. CR '905 provides that the nature of the work is "2-dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 20).

27 CR '905 provides that the nature of the authorship is "2-Dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 21).

28. U.S. Supplementary Copyright Registration No. VA 1-431-674 is also directed to Varsity Design 0815 and lists Varsity Spirit Corporation as the owner of CR '905. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1-431-674 is attached hereto as Exhibit D. (See Joint Statement of Undisputed Facts ¶ 22).

29. According to Kim Williams, an employee of Varsity, she sketched Varsity Design 0815. (See Williams Dep. at 98:13-17.) (See Joint Statement of Undisputed Facts ¶ 23).

Varsity Design 299 A

30. A copy of Copyright Registration VA 1-319-228 ("CR '228") is attached as Exhibit 15 to Williams Deposition. A copy of the deposit material for CR '228 is attached as Exhibit 15 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '228 are attached collectively hereto as Exhibit E. (See Joint Statement of Undisputed Facts ¶ 24).

31. The deposit material for '228 is a copy of a photograph. (See Joint Statement of Undisputed Facts ¶ 25).

32. The effective date stated on CR '228 is April 29, 2005. (See Joint Statement of Undisputed Facts ¶ 26).

33. The title of CR '228 is "299A" and CR '228 corresponds with Varsity design 299A (hereinafter

referred to as "Varsity Design 299A"). (See Joint Statement of Undisputed Facts ¶ 27).

34. CR '228 provides that the nature of the work is "FABRIC DESIGN (ARTWORK)." (See Joint Statement of Undisputed Facts ¶ 28).

35. CR '228 provides that the nature of the authorship is "2-Dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 29).

36. Varsity Spirit Fashions & Supplies, Inc. is listed as the owner of CR '228. (See Joint Statement of Undisputed Facts ¶ 30).

Varsity Design 299B

37. A copy of Copyright Registration VA 1-319-226 ("CR '226") is attached as Exhibit 16 to Williams Deposition. A copy of the deposit material for CR '226 is attached as Exhibit 16 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '226 are attached collectively hereto as Exhibit F. (See Joint Statement of Undisputed Facts ¶ 31).

38. The deposit material for CR '226 is a copy of a photograph. (See Joint Statement of Undisputed Facts ¶ 32).

39. The effective date stated on CR '226 is April 29, 2005. (See Joint Statement of Undisputed Facts ¶ 33).

40. The title of CR '226 is "299B" and CR '226 corresponds with Varsity design 299B (hereinafter referred to as "Varsity Design 299B"). (See Joint Statement of Undisputed Facts ¶ 34).

41. CR '226 provides that the nature of the work is "FABRIC DESIGN (ARTWORK)." (See Joint Statement of Undisputed Facts ¶ 35).

42. CR '226 provides that the nature of the authorship is "2-Dimensonal artwork." (See Joint Statement of Undisputed Facts ¶ 36).

43. Varsity Spirit Fashions & Supplies, Inc. is listed as the owner of CR '226. (See Joint Statement of Undisputed Facts ¶ 37).

Varsity Design 074

44. A copy of Copyright Registration VA 1-411 535 ("CR '535") is attached as Exhibit 5 to Williams Deposition. A copy of the deposit material for CR '535 is attached as Exhibit 5 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '535 are attached collectively hereto as Exhibit G. (See Joint Statement of Undisputed Facts ¶ 38).

45. The deposit material for CR '535 is a copy of a sketch. (See Joint Statement of Undisputed Facts ¶ 39).

46. The effective date stated on CR '535 is May 9 2007. (See Joint Statement of Undisputed Facts ¶ 40).

47. The title of CR '535 Is "Design Number 074" and CR '535 corresponds with Varsity design 074 (hereinafter referred to as "Varsity Design 074"). (See Joint Statement of Undisputed Facts ¶ 41).

48. CR '535 provides that the nature of the work is "2-dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 42).

49. CR '535 provides that the nature of the authorship is "2-Dimensional artwork." (See Joint Statement of Undisputed Facts ¶ 43).

50. U.S. Supplementary Copyright Registration No. VA 1-432-739 is also directed to Varsity Design 074 and lists Varsity Spirit Corporation as the owner of CR '535. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1 432-739 is attached hereto as Exhibit H. (See Joint Statement of Undisputed Facts ¶ 44).

51. According to Kim Williams, an employee of Varsity, she sketched Varsity Design 074. (Williams Dep. at 132:5-11.) (See Joint Statement of Undisputed Facts ¶ 45).

52. Star Athletica has only contracted with Kimro Manufacturing for the manufacture of garments. (Deposition of Kerry Leake ("Leake Dep.") 88:16-17).

53. At all times pertinent to this lawsuit, Varsity did not have an exclusive manufacturing agreement with Kimro Manufacturing.

54. Kimro Manufacturing has not breached any contracts between it and Varsity

55. Varsity has not pursued legal action against Kimro Manufacturing for breach of contract. (See Joint Statement of Undisputed Facts ¶ 47).

56. Kerry Leake, Sr. ("Kerry Leake") was an employee of Varsity from March 1986 until December 2009. (Deposition of Kerry Leake ("Leake Dep. ") at 18:16-19:9). (See Joint Statement of Undisputed Facts ¶ 48).

57 Kerry Leake had the title of Vice-President of Production for Varsity from 1988 until 2000. (Leake Dep. at 18:24-19:18; 140:15-18.) (See Joint Statement of Undisputed Facts ¶ 49).

58. The document bates-numbered VSC34670-VSC34679 is a true and correct copy of the employment agreement between Varsity and Kerry Leake. (See Joint Statement of Undisputed Facts ¶ 50).

59. In or around the third week of November, 2009, Varsity informed Leake that he was going to be laid off, told him that he could go home and that he didn't have to come back to the office, and tendered a separation agreement to him. (Leake Dep. at 46:24-47:25)

60. Leake did not sign the separation agreement that was offered.

61 The document bates-numbered VSC 9178-9182 is a true and correct copy of the separation agreement that was handed to Leake in November 2009.

62. Kerry Leake had the idea to set up a company like Star and contacted Jimmy Liebe by telephone in late November 2009. (See Leake Dep. at 40:20-41:16; B. Liebe Dep. at 71:11-25, 78:24-86:12.) (See Joint Statement of Undisputed Facts ¶ 51).

63. The day after Kerry Leake called Jimmy Liebe, a meeting took place in Chesterfield, Missouri, between Kerry Leake and his wife, Joan Leake, and Bill Liebe and Jimmy Liebe. (Leake Dep. at 42:9-43:4).During the meeting in Chesterfield, Kerry Leake brought up the idea of manufacturing and selling cheerleading uniforms. (Leake Dep. at 44:13-16).During that meeting, Kerry Leake suggested that

he and the Liebes could go into business and form a cheerleading manufacturing company. (Leake Dep. at 44:19-23; 69:5-10). (See Joint Statement of Undisputed Facts ¶ 52).

64. Prior to the meeting in Chesterfield in November 2009, there were no communications between Kerry Leake and Bill or Jimmy Liebe, regarding competing with Varsity. (Leake Dep. 63:7-16).

65. Kerry Leake sent Jimmy Liebe an email on December 28, 2009, expressing his thoughts on Star as a company and its potential. (Exhibit 25 to Leake Dep.: December 28, 2009 Email from Kerry Leake; Leake Dep. at 222:1-223:9.) (See Joint Statement of Undisputed Facts ¶ 53).

66. In January 2010, Kerry Leake emailed proposed versions of the name and logo of Star to Bill Liebe. (See Exhibit 30 to Leake Dep.: January 21, 2010 Email from Kerry Leake; Leake Dep. at 229:14-230:13.) (See Joint Statement of Undisputed Facts ¶ 54).

67. Kerry Leake has not received any income whatsoever, other than Social Security, since his employment ceased with Varsity. (Leake Dep. at 54:3-6).

68. After 2002, Kerry Leake had no access to any of Varsity's pattern files, lettering placement guidelines, cut files, braid patterns, box pleat patterns, customer lists, Varsity passwords, or cost information or any sketches from Varsity's designers or photographs taken for Varsity's catalogs. (Leake Dep. at 104:3-105:6).

69. In November 2009, Kerry Leake did not possess any of Varsity's pattern files or lettering

placement guidelines or manufacturing specifications. (Leake Dep. at 105:21-25).

70. Kerry Leake has not provided any of Varsity's pattern files or lettering placement guidelines to RJ Leibe [sic] Athletic Lettering Company, Jimmy Liebe, William Liebe, Star Athletica, LLC, Kimro Manufacturing, or any of Star's sales representatives or suppliers. (Leake Dep. at 108:1-110:25)

71 No one from RJ Leibe [sic] Athletic Lettering Company has ever provided Leake with a Varsity pattern file, lettering placement guideline, cut file, braid pattern file, or customer list. (Leake Dep. at 114:9-25).

72. No one from Star has ever provided Kerry Leake with a Varsity pattern file, lettering placement guideline, cut file, braid pattern file, or customer list. (Leake Dep. at 115:1-3).

73. Rebecca Cook started working for Varsity in 1990 in customer service, and later became a sales representative. (Cook Dep. at 18:11-20). (See Joint Statement of Undisputed Facts ¶ 55).

74. Effective October 15, 2009, Varsity terminated Rebecca Cook's employment. (Cook Dep. at 18:21-23). (See Joint Statement of Undisputed Facts ¶ 56).

75. In or around February or March 2010, Kerry Leake telephoned Rebecca Cook and left a message on her voicemail when she did not answer. (Leake Dep. at 78:21-24). Cook returned Leake's call, and they discussed the possibility of Cook coming to work for Star. (Cook Dep. at 23:11-24:7). (See Joint Statement of Undisputed Facts ¶ 57).

76. Rebecca Cook began working for Star in or around February or March of 2010 as an independent sales contractor. (Cook Dep. at 25:8-26:13). (See Joint Statement of Undisputed Facts ¶ 58).

77 At the time that Rebecca Cook became an independent sales representative for Star, Kerry Leake did not know that she had a non-compete agreement with Varsity. (Leake Dep. at 80:20-22; Cook Dep. at 27:25-28:3).

78. At the time that Rebecca Cook became an independent sales representative for Star, she did not believe that she had a non-compete agreement with Varsity. (Leake Dep. at 28:4-8).

79. Rebecca Cook's alleged non-compete obligations expired 18 months after the termination of her employment with Varsity. (VSC34680-VSC34685). (See Joint Statement of Undisputed Facts ¶ 59).

80. A true and correct copy of the Sales Representative Agreement between Varsity and Rebecca Cook is Exhibit 1 to her deposition. (Cook Dep. at Exhibit 1). (See Joint Statement of Undisputed Facts ¶ 60).

81. Exhibit 1 to the deposition of Rebecca Cook is the only written agreement between Varsity and Rebecca Cook.

82. After receiving a letter from Grady M. Garrison, counsel for Varsity, dated March 2, 2010, Rebecca Cook refrained from working as a salesperson (or otherwise soliciting customers) for Star until May 2011. (Cook Dep. at Exhibit 6; Cook Dep. at 16:24-17:18; 45:19-21; 20:24-25; 22:23-23:6).

83. Kerry Leake never asked Michelle Radon whether she had a non-compete agreement with Varsity. (Leake Dep. at 94:6-9).

84. Since 2010, Star's independent sales representatives have included, among others, Michele Radon, Ray Lyons, and Linda DeMoss. (B. Liebe Dep. at 114:3-120:25.) (See Joint Statement of Undisputed Facts ¶ 61).

85. As of April 2012, Joan Leake, wife of Kerry Leake, had worked for Star for two years as an employee with ADP (B. Liebe Dep. at 59:14-65:15.) (See Joint Statement of Undisputed Facts ¶ 62).

86. Kerry Leake decided which cheerleading uniforms would be photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.) (See Joint Statement of Undisputed Facts ¶ 63).

87. Kerry Leake testified that he made the patterns for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.) (See Joint Statement of Undisputed Facts ¶ 64).

88. Kerry Leake testified that he made all of the patterns for all of the garments that were shown in the 2010 Star Athletica catalog. (Leake Dep. at 163:3-6.) (See Joint Statement of Undisputed Facts ¶ 65).

89. Kerry Leake testified that he had the Star cheerleading uniforms manufactured based upon the patterns he testified he made for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.) (See Joint Statement of Undisputed Facts ¶ 66).

90. Kerry Leake oversaw the photo shoot of the cheerleading uniforms which were photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.) (See Joint Statement of Undisputed Facts ¶ 67).

91. Star's naming conventions consist of an alphabetic code separately assigned to each uniform to describe the fabric, uniform, mascot and style codes for Star's uniform. For example, TTMEG stands for Tackle Twill Megaphone. (Deposition of Robert J. Liebe ("RJ Liebe Dep.") at 113:16-20).

92. Tackle twill is a fabric that the R.J. Liebe Lettering Company used. Webster Fabric Company, a part of R.J. Liebe Lettering Company, owned trademark rights for "Tackle-Twill" When the trademark for "Tackle-Twill" expired, the term became generic in the industry (RJ Liebe Dep. at 190: 9-191: 12).

93. Star's style codes for tackle twill and garment styles are generic alphabetic codes and nomenclature that are universally used in the garment manufacturing business for athletic uniforms. (RJ Liebe Dep. at 161:3; 191:12).

94. The tackle twill style codes on page 216 of the 2012 Varsity catalog correspond to the tackle twill products depicted above each style code. For example TTMEG stands for Tackle Twill Megaphone (Deposition of Gary Spencer ("Spencer Dep.") at 162:8-163:1). The style codes under the tackle twill products displayed on page 216 of the 2012 Varsity catalog refer to those products. (Williams Dep. at 198:18-199:22).

95. The embroidered mascot style codes on page 218-219 of Varsity's 2012 catalog correspond to the embroidered mascot products depicted above each style code which are standard in the industry. (RJ Liebe Dep. at 117:3-13; Spencer Dep. at 162:8-163:1).

96. The ECM style codes underneath each of the embroidered mascot products on page 218-219 of the 2012 Varsity catalog are for those products depicted. (Williams Dep. at 198:18-199:22).

Date: February 28, 2013 Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC.,
VARSITY SPIRIT CORPORATION and
VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,

Plaintiffs,

v. No. 10-cv-02508-RHC-cgc

STAR ATHLETICA, L.L.C.,

FILED UNDER SEAL

Defendant.

JOINT STATEMENT OF UNDISPUTED FACTS FOR THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

The parties submit the following joint statement of undisputed facts solely for purposes of cross-motions for summary judgment. The parties reserve all objections as to materiality and relevancy of these facts and all objections as to the admissibility of any documents, facts, and testimony at trial.

1 The plaintiffs in this case are Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (hereinafter collectively referred to as "Varsity"). Varsity is engaged in the business of developing designs and manufacturing and selling apparel and accessories for use in cheerleading and other activities. (Complaint ¶¶ 8, 16).

2. Star Athletica, LLC ("Star") is a limited liability corporation organized on January 25, 2010, and existing under the laws of the State of Missouri with its principal place of business at 582 Goddard Avenue, Chesterfield, Missouri 63005. (See Exhibits 1 and 2 to Deposition of William Liebe ("B. Liebe Dep. "): Articles and Certificate of Organization of Star Athletica, LLC; B. Liebe Dep. at 13:4-10.)

3. Star has an additional facility in Horn Lake, Mississippi. (B. Liebe Dep. at 38:18-22.) Order entry, customer support, inventory storage, computerized cutting and direct-to-print manufacturing occur at the Horn Lake office of Star Athletica. (B. Liebe Dep. at 124:15-125:25.)

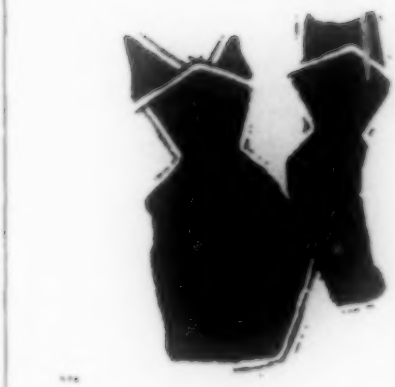
4. Bill Liebe is the manager of Star. (See B. Liebe Dep. at 33:8-16.)

5. Star markets and sells football uniforms and accessories, baseball uniforms, basketball uniforms, lacrosse uniforms and cheerleading goods, including shells, shell tops, warm-ups, skirts, accessories, poms, and rain jackets. (B. Liebe Dep. at 49:1-14.)

6. Bill Liebe, as of the time of his deposition, testified Star did not sell or make profits from any of its cheerleader uniform women's shell tops at issue in this case. (Exhibit 37 of B. Liebe Dep., Star08087, B. Liebe Dep. at 249:25-250:11).

7 The five (5) copyright registrations and the corresponding copyright deposits at issue in this case are as follows (Complaint ¶¶11, 28, 35, 41, and 48 and First Amendment To Complaint ¶55):

VA 1-675-905 (Varsity Design 0815)	
VA 1-319-228 (Varsity Design 299A)	

VA 1-417-427 (Varsity Design 078)	
VA 1-411-535 (Varsity Design 074)	

VA 1-319-226 (Varsity Design 299B)	

Varsity Design 078

8. A copy of Copyright Registration VA 1-417-427 ("CR '427") is attached as Exhibit 6 to Williams Deposition. A copy of the deposit material for CR '427 is attached as Exhibit 6 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '427 are attached collectively hereto as Exhibit A.

9. The deposit material for CR '427 is a copy of a sketch.

10. The effective date stated on CR '427 is May 21, 2007

11. The title of CR '427 is "Design Number 078" and CR '427 corresponds with Varsity design 078 (hereinafter referred to as "Varsity Design 078").

12. CR '427 provides that the nature of the work is "2-dimensional artwork."

13. CR '427 provides that the nature of the authorship is "2-Dimensional artwork."

14. U.S. Supplementary Copyright Registration No. VA 1-432-737 is also directed to Varsity Design 078 and lists Varsity Spirit Corporation as the owner of the CR '427. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1-432-737 is attached hereto as Exhibit B.

15. According to Kim Williams and Amy Bailey, employees of Varsity, they sketched Varsity Design 078. (See Deposition of Amy Bailey ("Bailey Dep.") at 158:5-15.)

Varsity Design 0815

16. A copy of Copyright Registration VA 1-675-905 ("CR '905") is attached as Exhibit 2 to Williams Deposition. A copy of the deposit material for CR '905 is attached as Exhibit 2 to the Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '905 are attached collectively hereto as Exhibit C.

17 The deposit material for CR '905 is a copy of a sketch.

18. The effective date stated on CR '905 is May 12, 2008.

19. The title of CR '905 is "0815" and CR '905 corresponds with Varsity design 0815 (hereinafter referred to as "Varsity Design 0815").

20. CR '905 provides that the nature of the work is "2-dimensional artwork."

21 CR '905 provides that the nature of the authorship is "2-Dimensional artwork."

22. U.S. Supplementary Copyright Registration No. VA 1-431-674 is also directed to Varsity Design 0815 and lists Varsity Spirit Corporation as the owner of CR '905. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1-431-674 is attached hereto as Exhibit D.

23. According to Kim Williams, an employee of Varsity, she sketched Varsity Design 0815. (See Williams Dep. at 98:13-17.)

Varsity Design 299A

24. A copy of Copyright Registration VA 1-319-228 ("CR '228") is attached as Exhibit 15 to Williams Deposition. A copy of the deposit material for CR '228 is attached as Exhibit 15 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '228 are attached collectively hereto as Exhibit E.

25. The deposit material for '228 is a copy of a photograph.

26. The effective date stated on CR '228 is April 29, 2005.

27 The title of CR '228 is "299A" and CR '228 corresponds with Varsity design 299A (hereinafter referred to as "Varsity Design 299A").

28. CR '228 provides that the nature of the work is "FABRIC DESIGN (ARTWORK)."

29. CR '228 provides that the nature of the authorship is "2-Dimensional artwork."

30. Varsity Spirit Fashions & Supplies, Inc. is listed as the owner of CR '228.

Varsity Design 299B

31. A copy of Copyright Registration VA 1-319-226 ("CR '226") is attached as Exhibit 16 to Williams Deposition. A copy of the deposit material for CR '226 is attached as Exhibit 16 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '226 are attached collectively hereto as Exhibit F

32. The deposit material for CR '226 is a copy of a photograph.

33. The effective date stated on CR '226 is April 29, 2005.

34. The title of CR '226 is "299B" and CR '226 corresponds with Varsity design 299B (hereinafter referred to as "Varsity Design 299B").

35. CR '226 provides that the nature of the work is "FABRIC DESIGN (ARTWORK)."

36. CR '226 provides that the nature of the authorship is "2-Dimensonal artwork."

37 Varsity Spirit Fashions & Supplies, Inc. is listed as the owner of CR '226.

Varsity Design 074

38. A copy of Copyright Registration VA 1-411 535 ("CR '535") is attached as Exhibit 5 to Williams Deposition. A copy of the deposit material for CR '535 is attached as Exhibit 5 to Williams Deposition. True, correct, and authentic copies of the copyright registration and the deposit for CR '535 are attached collectively hereto as Exhibit G.

39. The deposit material for CR '535 is a copy of a sketch.

40. The effective date stated on CR '535 is May 9, 2007.

41. The title of CR '535 is "Design Number 074" and CR '535 corresponds with Varsity design 074 (hereinafter referred to as "Varsity Design 074").

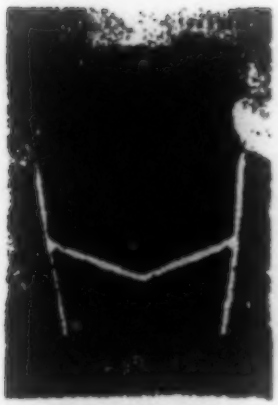
42. CR '535 provides that the nature of the work is "2-dimensional artwork."

43. CR '535 provides that the nature of the authorship is "2-Dimensional artwork."

44. U.S. Supplementary Copyright Registration No. VA 1-432-739 is also directed to Varsity Design 074 and lists Varsity Spirit Corporation as the owner of CR '535. A true, correct, and authentic copy of U.S. Supplementary Copyright Registration No. VA 1-432-739 is attached hereto as Exhibit H.

45. According to Kim Williams, an employee of Varsity, she sketched Varsity Design 074. (Williams Dep. at 132:5-11.)

46. Pictures of Varsity's physical cheerleading uniforms with corresponding style numbers WS0815RA, WS299A, WS078FA, WS074RA, and WS299B are shown below (These physical cheerleading uniforms were marked as Exhibits 10-14 at the deposition of Kim Williams):



Williams Ex. 10
WS0815RA

Williams Ex. 11
WS299A

Williams Ex. 12
WS078FA

Williams Ex. 13
WS074RA

Williams Ex. 14
WS299B

47. Varsity has not pursued legal action against Kimro Manufacturing for breach of contract relating to the issues in this lawsuit.

48. Kerry Leake, Sr ("Kerry Leake") was an employee of Varsity from March 1986 through December 2009. (Deposition of Kerry Leake ("Leake Dep. ") at 18:16-19:9.)

49. Kerry Leake had the title of Vice-President of Production for Varsity from 1988 until 2000. (Leake Dep. at 18:24-19:18; 140:15-18.)

50. The document bates-numbered VSC34670-VSC34679 is a true and correct copy of the employment agreement between Varsity and Kerry Leake.

51. Kerry Leake had the idea to set up a company like Star and contacted Jimmy Liebe by telephone in late November 2009. (See Leake Dep. at 40:20-41:16; B. Liebe Dep. at 71:11-25, 78:24-86:12.)

52. The day after Kerry Leake called Jimmy Liebe a meeting took place in Chesterfield, Missouri, between Kerry Leake and his wife, Joan Leake, and Bill Liebe and Jimmy Liebe. (Leake Dep. at 42:9-

43:4). During the meeting in Chesterfield, Kerry Leake brought up the idea of manufacturing and selling cheerleading uniforms. (Leake Dep. at 44:13-16). During that meeting, Kerry Leake suggested that he and the Liebes could go into business and form a cheerleading manufacturing company. (Leake Dep. at 44:19-23; 69:5-10).

53. Kerry Leake sent Jimmy Liebe an email on December 28, 2009, expressing his thoughts on Star as a company and its potential. (Exhibit 25 to Leake Dep.: December 28, 2009 Email from Kerry Leake; Leake Dep. at 222:1-223:9.)

54. In January 2010, Kerry Leake emailed proposed versions of the name and logo of Star to Bill Liebe. (See Exhibit 30 to Leake Dep.: January 21, 2010 Email from Kerry Leake; Leake Dep. at 229:14-230:13.)

55. Rebecca Cook started working for Varsity in 1990 in customer service, and later became a sales representative. (Deposition of Rebecca Cook ("Cook Dep.") 18:11-20).

56. Effective October 15, 2009, Varsity terminated Rebecca Cook's employment. (Cook Dep. at 18:21-23).

57 In or around February or March 2010, Kerry Leake telephoned Rebecca Cook and left a message on her voicemail when she did not answer. (Leake Dep. at 78:21-24). Cook returned Leake's call, and they discussed the possibility of Cook coming to work for Star. (Cook Dep. at 23:11-24:7).

58. Rebecca Cook began working for Star in or around February or March of 2010 as an independent sales contractor. (Cook Dep. at 25:8-26:13).

59. Rebecca Cook's alleged non-compete obligations expired 18 months after the termination of her employment with Varsity. (VSC34680-VSC34685).

60. A true, correct, and authentic copy of the Sales Representative Agreement between Varsity and Rebecca Cook, dated April 1, 1993, is Exhibit 1 to her deposition. (Cook Dep. at Exhibit 1.)

61 Since 2010, Star's independent sales representatives have included, among others, Michele Radon, Ray Lyons, and Linda DeMoss. (B. Liebe Dep. at 114:3-120:25.).

62. As of April 2012, Joan Leake, wife of Kerry Leake, had worked for Star for two years as an employee with ADP (B. Liebe Dep. at 59:14-65:15.)

63. Kerry Leake decided which cheerleading uniforms would be photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.)

64. Kerry Leake testified that he made the patterns for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.)

65. Kerry Leake testified that he made all of the patterns for all of the garments that were shown in the 2010 Star Athletica catalog. (Leake Dep. at 163:3-6.)

66. Kerry Leake testified that he had the Star cheerleading uniforms manufactured based upon the patterns he testified he made for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.)

67 Kerry Leake oversaw the photo shoot of the cheerleading uniforms which were photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.)

68. For purposes of summary judgment only, the parties stipulate that the following documents are true, correct, and authentic copies of the items identified below:

a. Document VSC 34670-34679: Employment Agreement between Kerry Leake and Varsity Spirit Corporation dated March 1, 2000;

b. Document STAR 08087: Star's Profit and Loss Statement for 2011;

c. Document VSC 9178-9182: Separation agreement tendered to Kerry Leake by Varsity in November 2009;

d. Document STAR 5284-5285: E-mail communications between Rebecca Cook and Tim Liebe between April 19, 2010 and April 21, 2010;

e. Document bates-numbered STAR 4415: email exchange between Kerry Leake and Amy Hoffman dated October 1, 2010;

f. Document bates-numbered STAR 7405: email exchange between Michelle Radon and Bill Liebe dated September 20, 2011;

g. Document bates-numbered STAR5344-STAR5345: email exchange from Ray Lyons

h. Document bates-numbered STAR 4102: email from Amy Hoffman dated May 2, 2011;

i. Document bates-numbered STAR 284-285: email exchange between Bill Liebe, Tim Liebe, and Kerry Leake dated April 13, 2010.

j. Exhibit 4 to the deposition of Webb: copy of the 1998 Varsity catalog, Bates stamped VSC34603;

k. Exhibit 5 to the deposition of Webb: copy of the 1999 Varsity catalog, Bates stamped VSC34605;

l. Exhibit 6 to the deposition of Webb: copy of the 2000 Varsity catalog, Bates stamped VSC34607;

m. Exhibit 7 to the deposition of Webb: copy of the 2001 Varsity catalog, Bates stamped VSC34609;

n. Exhibit 8 to the deposition of Webb: copy of the 2002 Varsity catalog, Bates stamped VSC34611;

o. Exhibit 9 to the deposition of Webb: copy of the 2003 Varsity catalog, Bates stamped VSC34613;

p. Exhibit 10 to the deposition of Webb: copy of the 2004 Varsity catalog, Bates stamped VSC34615;

q. Exhibit 11 to the deposition of Webb: copy of the 2005 Varsity catalog, Bates stamped VSC34617;

r. Exhibit 12 to the deposition of Webb: copy of the 2006 Varsity catalog, Bates stamped VSC34621;

s. Exhibit 13 to the deposition of Webb: copy of the 2007 Varsity catalog, Bates stamped VSC34625;

t. Exhibit 14 to the deposition of Webb: copy of the 2008 Varsity catalog, Bates stamped VSC34629;

u. Exhibit 15 to the deposition of Webb: copy of the 2009 Varsity catalog, Bates stamped VSC34633.

v. Exhibit 16 to the deposition of Webb: copy of the 2010 Varsity catalog, Bates stamped VSC34639;

w. Exhibit 17 to the deposition of Webb: copy of a letter dated May 23, 2005 from Arlana Cohen, counsel for Varsity, to Ms. Sherise Ralson of TEAMLEADER.COM and attached summons and First Amended Complaint signed by Grady Garrison, Counsel for Varsity, in civil action 05 Civ. 2340 filed in the Western District of Tennessee;

x. Exhibit 18 to the deposition of Webb: copy of a letter dated May 10, 2011 from Grady Garrison, counsel for Varsity, to the President of It's Greek To Me, Inc. which was filed as Doc. # 5-2 on the ECF system in the Western District of Tennessee in civil action 2:11-cv-02465;

y. Exhibit 19 to the deposition of Webb: copy of a letter dated March 4, 2010 from Grady Garrison, counsel for Varsity, to Mr. Robert James Liebe, III;

z. Exhibit 7 to the deposition of Spencer: copy of the Varsity Spirit Fashion quality assurance and construction guidelines.

aa. Exhibit 8 to the deposition of Spencer: copy of the Varsity Spirit Fashions & Cheerleader & Danz Team training manual.

bb. Document bates-numbered STAR 04421: email from Amy Hoffman to Kerry Leake, forwarding an email from Karen Lyon to Amy Hoffman, dated September 15, 2010;

cc. Document bates-numbered STAR 04407: email from Ray Lyons to Sherry Robison and copied to Kerry Leake, dated March 18, 2011;

dd. Document bates-numbered STAR 04415: email from Amy Hoffman to Kerry Leake, dated October 1, 2010;

ee. Document bates-numbered STAR 04403: email from Michele Radon to Kerry Leake, dated April 11, 20110;

ff. Exhibit 1 to the deposition of Leake: copy of the 2010 Star catalog, Bates stamped STAR 00007;

gg. Exhibit 2 to the deposition of Leake: email exchange between Kerry Leake, Dawnie Phann, Bill Liebe, and Tim Liebe, dated April 13, 2010, Bates stamped STAR 00284,00285, and 00318;

hh. Exhibit 3 to the deposition of Leake: email exchange between Kerry Leake, Amy Hoffman, Bill Liebe, Tim Liebe, and Mark Odom, dated April 2 and April 15, 2010, Bates stamped STAR 00536 and 03952-03955;

ii. Exhibit 6 to the deposition of Leake: email exchange between Debra Black, Rebecca Cook, Kerry Leake, Bill Liebe, and Debbie Frillman dated May 3 to May 6, 2010, Bates stamped STAR 05004-05007;

jj. Exhibit 7 to the deposition of Leake: email from Russ Moore to Kerry Leake, dated June 18, 2010, Bates stamped STAR 03941;

kk. Exhibit 8 to the deposition of Leake: email from Russ Moore to Kerry Leake, dated June 17, 2010, Bates stamped STAR 03947;

ll. Exhibit 9 to the deposition of Leake: email from Ray Lyons to Kerry Leake, undated, Bates stamped STAR 03959;

mm. Exhibit 10 to the deposition of Leake: email from Ray Lyons to Kerry Leake, undated, Bates stamped STAR 03961;

nn. Exhibit 11 to the deposition of Leake: email exchange between Kerry Leake and Michele Radon, dated June 3, 2010, Bates stamped STAR 03973;

oo. Exhibit 12 to the deposition of Leake: email exchange between Michele Radon and Kerry Leake, dated May 31, 2011, Bates stamped STAR 03999-04000;

pp. Exhibit 13 to the deposition of Leake: email exchange between Michele Radon and Kerry Leake, dated April 13, 2011, Bates stamped STAR 03928-03929;

qq. Exhibit 14 to the deposition of Leake: email exchange between Ray Lyons and Kerry Leake, dated April 19, 2011, Bates stamped STAR 03963;

rr. Exhibit 15 to the deposition of Leake: email from Ray Lyons to Kerry Leake, dated April 29, 2011, Bates stamped STAR 04018-04020;

ss. Exhibit 16 to the deposition of Leake: email from Michele Radon to Kerry Leake, dated September 17, 2010, Bates stamped STAR 04024;

tt. Exhibit 17 to the deposition of Leake: email exchange between Ray Lyons and Kerry Leake, dated July 28, 2011, Bates stamped STAR 04057;

uu. Exhibit 18 to the deposition of Leake: email from Ray Lyons to Kerry Leake, Joan Leake, and Sherry Robinson, dated July 22, 2011, Bates stamped STAR 04059;

vv. Exhibit 19 to the deposition of Leake: email from Michele Radon to Kerry Leake, dated April 27, 2011, Bates stamped STAR 04107-04108;

ww. Exhibit 20 to the deposition of Leake: email from Michele Radon to Kerry Leake, dated June 7, 2010, Bates stamped STAR 04214-04215;

xx. Exhibit 21 to the deposition of Leake: email from Missy Mink to Kerry Leake, dated June 18, 2010, Bates stamped STAR 04985;

yy. Exhibit 22 to the deposition of Leake: email exchange between Joe Long and Kerry Leake, dated September 8, 2011, Bates stamped STAR 04528;

zz. Exhibit 23 to the deposition of Leake: email from Ray Lyons to Kerry Leake, Sherry Robinson, and Joan Leake, dated June 27, 2011, Bates stamped STAR 05343-05345;

aaa. Exhibit 24 to the deposition of Leake: email exchange between Michele Radon, Kerry Leake, Joan Leake, Michelle Burgio, and Allison Ragusa, dated September 7 and 9, 2011, Bates stamped STAR 06431-06436;

bbb. Exhibit 25 to the deposition of Leake: email from Kerry Leake to Jimmy Liebe, dated

December 28, 2009. Bates stamped SALEAKE 000033-000035;

ccc. Exhibit 26 to the deposition of Leake: email from Kerry Leake, dated February 12, 2010, Bates stamped SALEAKE 000090;

ddd. Exhibit 27 to the deposition of Leake: email from Bill Liebe to Kerry Leake, dated February 28, 2010, Bates stamped SALEAKE 000411;

eee. Exhibit 28 to the deposition of Leake: email from Bill Liebe to Kerry Leake and Jimmy Liebe, dated November 30, 2009, Bates stamped SALEAKE 000003;

fff. Exhibit 29 to the deposition of Leake: copy of a facsimile from Amy Hoffman to Kerry Leake, dated May 2, 2011, Bates stamped STAR 04102;

ggg. Exhibit 30 to the deposition of Leake: email exchange between Bill Liebe and Kerry Leake, dated January 21, 2010, Bates stamped SALEAKE 000045-000046;

hhh. Exhibit 32 to the deposition of Leake: email exchange between Ray Lyons and Kerry Leake, dated May 5, 2011, Bates stamped STAR 04013;

iii. Exhibit 33 to the deposition of Leake: emails to and from Kerry Leake, various dates, Bates stamped SALEAKE 000504, 000032, 000005, STAR 04507, 04449, 04450-04455, and 04492;

jjj. Exhibit 1 to the deposition of Bill Liebe: copy of the Articles of Organization of Star Athletica, LLC, Bates stamped STAR 00008;

kkk. Exhibit 2 to the deposition of Bill Liebe: copy of the Certificate of Organization of Star Athletica, LLC, Bates stamped STAR 00009;

lll. Exhibit 7 to the deposition of Bill Liebe: email exchange between Debra Black, Rebecca Cook, Kerry Leake, and Bill Liebe, dated May 3 to May 5, 2010, Bates stamped STAR 00497-00499;

mmm. Exhibit 9 to the deposition of Bill Liebe: email exchange between Jimmy Liebe, Kerry Leake, Bill Liebe, Rob Knoll, Dave Eshelman, Tim Liebe, Katie Liebe, and Tracey Starck, dated February 23 to 24, 2010, Bates stamped STAR 00563-00565;

nnn. Exhibit 10 to the deposition of Bill Liebe: email from Bill Liebe to Michele Radon, dated December 16, 2010, Bates stamped STAR 07128-07130;

ooo. Exhibit 11 to the deposition of Bill Liebe: email from Bill Liebe to Kerry Leake, dated February 24, 2010, Bates stamped SALEAKE 000181;

ppp. Exhibit 12 to the deposition of Bill Liebe: email from Bill Liebe to Jimmy Liebe, dated February 18, 2010, Bates stamped STAR 07993-07995;

qqq. Exhibit 13 to the deposition of Bill Liebe: email from Bill Liebe to Jimmy Liebe, Jim Liebe, Tim Liebe, Tracey Starck, Katie Liebe, and Kerry Leake, dated February 22, 2010, Bates stamped SALEAKE 000150-000151;

rrr. Exhibit 14 to the deposition of Bill Liebe: email from Kerry Leake to Bill Liebe, dated March 2, 2010, Bates stamped SALEAKE 000446-000448;

sss. Exhibit 15 to the deposition of Bill Liebe: Star price comparison chart, Bates stamped STAR 04424;

ttt. Exhibit 16 to the deposition of Bill Liebe: email exchange between Joanna Small, Bill Liebe, Kerry Leake, Joan Leake, Michele Radon, dated September 20, 2011, Bates stamped STAR 07405-07406;

uuu. Exhibit 17 to the deposition of Bill Liebe: email from Bill Liebe, dated March 11, 2010, Bates stamped SALEAKE 000510;

vvv Exhibit 18 to the deposition of Bill Liebe: email from Kerry Leake to Bill Liebe, dated March 16, 2010, Bates stamped SALEAKE 000520;

www Exhibit 19 to the deposition of Bill Liebe: email from Bill Liebe, dated January 27, 2010, Bates stamped SALEAKE 000050;

xxx. Exhibit 20 to the deposition of Bill Liebe: email from Kerry Leake to Bill Liebe, dated February 11, 2010, Bates stamped SALEAKE 000079;

yyy. Exhibit 21 to the deposition of Bill Liebe: email from Bill Liebe to Kerry Leake, dated February 24, 2010, Bates stamped SALEAKE 000158-000180;

zzz. Exhibit 24 to the deposition of Bill Liebe: email from Bill Liebe to Kerry Leake and Jimmy Liebe, dated January 22, 2010, Bates stamped SALEAKE 000047;

aaaa. Exhibit 25 to the deposition of Bill Liebe: email from Bill Liebe to Kerry Leake, Jimmy Liebe, Tracey Starck, Katie Liebe, and Tim Liebe, dated February 4, 2010, Bates stamped SALEAKE 000055-000056;

bbbb. Exhibit 26 to the deposition of Bill Liebe: email from Bill Liebe to Kerry Leake, Jimmy Liebe, and Tim Liebe, dated February 15, 2010, Bates stamped SALEAKE 000132;

cccc. Exhibit 27 to the deposition of Bill Liebe: email from Michele Radon to Bill Liebe, dated June 25, 2010, Bates stamped STAR 07325-07326;

dddd. Exhibit 28 to the deposition of Bill Liebe: Ray Lyons' Sales Representative Agreement with Star, dated January 16, 2012, Bates stamped STAR 07599;

eeee. Exhibit 29 to the deposition of Bill Liebe: email exchange between Ray Lyons, Bill Liebe, and Kristen Culleton, dated June 23 and 24, 2011, Bates stamped STAR 07691-07692;

ffff. Exhibit 30 to the deposition of Bill Liebe: email from Kerry Leake to Bill Liebe, dated March 3, 2010, Bates stamped SALEAKE 000452;

gggg. Exhibit 31 to the deposition of Bill Liebe: email from Bill Liebe to Stefanie Ravenhill, Jimmy Liebe, Kerry Leake, and Tom Spalding, dated February 26, 2010, Bates stamped SALEAKE 000327-000328;

hhhh. Exhibit 32 to the deposition of Bill Liebe: email from Bill Liebe, dated March 1, 2010, Bates stamped SALEAKE 000413-000415;

iiii. Exhibit 33 to the deposition of Bill Liebe: email from Bill Liebe, dated March 23, 2010, Bates stamped STAR 00304-00306;

jjjj. Exhibit 34 to the deposition of Bill Liebe: email from Kerry Leake to Bill Liebe, dated April 26, 2010, Bates stamped STAR 02791;

kkkk. Exhibit 35 to the deposition of Bill Liebe: email exchange between Kerry Leake and Bill Liebe, dated June 15, 2010, Bates stamped STAR 02497;

llll. Exhibit 36 to the deposition of Bill Liebe: email from Bill Liebe, dated February 26, 2010, Bates stamped SALEAKE 000377-000378.

Date: February 28, 2013

Respectfully submitted,

s/ Adam S. Baldridge

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,	)	No.: 2:10-cv-02508-RHC-cgc
Plaintiffs,	)	**FILED UNDER SEAL**
v.	)	
STAR ATHLETICA, L.L.C.,	)	
Defendant.	)	

VARSITY'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs Varsity Brands, Inc., Varsity Spirit Corporation, and Varsity Spirit Fashions & Supplies, Inc. (hereinafter collectively referred to as "Varsity") and submit this Statement of Undisputed Facts In Support of Motion for Summary Judgment. In addition to the facts set forth below, Varsity relies upon certain facts included in the parties' Joint Statement of Undisputed Facts:

1. Varsity employs designers to create two-dimensional designs. (Ex. A Declaration of Gary Spencer ("Spencer Decl.") ¶ 2.) Kim Williams is Varsity's Vice President of Design and its lead

designer. (Ex. B Declaration of Kim Williams ("Williams Decl.") ¶ 1.)

2. Gary Spencer is Varsity's Vice President of Production. (Spencer Decl. ¶ 1.) Mr. Spencer's department is the portion of the company that is responsible for incorporating designs onto the surface of different types of garments. (Spencer Decl. ¶ 2.) Varsity's Production Department and Design Department are two separate departments at Varsity. (Spencer Decl. ¶ 3.)

3. Varsity's 0815, 078, and 074 designs were created as sketches on pieces of paper. (Williams Decl." ¶ 5; Ex. C Deposition of Kimberly Williams ("Williams Dep.") at 38:21-25 ("I would design basically -- what we design is, you know, original combinations of elements. So it's a two-dimensional piece of art. It's a drawing on a piece of paper. So I would draw a sketch on a piece of paper."); at 93:7-8 ("All of our designers are designing on paper."); at 48:19 49:1 ("[E]verything, of course, starts with a concept. As I mentioned before, you know, as designers there's always ideas floating around. And those are eventually transferred on to paper in the form of a sketch..."); at 53:4-7 ("Initially it's completely apart from the uniform. I mean, initially that concept and sketch it's not on a uniform. It's a drawing on a piece of paper.").)

4. Varsity's designs, including 0815, 074, 078, 299A and 299B, comprise original combinations, positionings, and arrangements of elements which include V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's, coloring, and shapes, etc. (Williams Dep. at 39:13-19 ("Well, I mean, basic forms. They would be basic forms in themselves. It's

the unique and original combination of those elements. So it could be lines, diagonals, V's while in themselves are basic, but the combination and position and arrangement of those elements is what creates a design."); at 61:20-22 ("[S]ketch is our illustration of an original combination of various types of design elements.").)

5. In creating Designs 0815 and 074, Ms. Williams was not attempting to increase the functionality of any garment or anything else onto which the designs may be incorporated. (Williams Decl. ¶¶ 5 & 9.)

6. In creating Design 074, Ms. Williams and Ms. Bailey were not attempting to increase the functionality of any garment or anything else onto which the design may be incorporated. (Williams Decl. ¶¶ 5 & 9.)

7. When Designs 299A and 299B were sketched, they were illustrated by Kraig Tallman, a former Varsity designer who is now deceased. (Williams Decl. ¶ 5; Williams Dep. at 170:14-16.)

8. Design 0815 was first published in Varsity's 2008 catalog, with the design being displayed on the surface of an uniform. (Williams Decl. ¶ 5.)

9. Designs 078 and 074 were first published in Varsity's 2007 catalog, with those designs being displayed on the surfaces of uniforms. (Williams Decl. ¶ 5.)

10. Designs 299A and 299B were first published in 1999, with those designs being displayed on the surface of cheerleading uniforms shown in Varsity's 1999 catalog. (Williams Decl. ¶ 5.)

11. Since the time that Williams became the lead designer for Varsity, Ms. Williams' design team has

created over 100 different two-dimensional designs each year. (Williams Decl. ¶ 6.)

12. At the time a sketch is created by Varsity's designers, it is not known if the design will be used on a garment. (Williams Decl. ¶ 6; Williams Dep. at 41:4-7 ("I would create drawings of designs that were sometimes placed on uniforms, sometimes placed on other things."); at 70:11-16 ("Once a sketch is on paper and we have determined that that design will move forward in our line, we will determine what types of products that design will be placed on.").)

13. It is also unknown whether the design will be implemented onto the surface of a garment by sublimation or by cut and sew. (Williams Decl. ¶ 6.)

14. Only a portion of the designs created each year are used, i.e., selected to be incorporated onto the surface of cheerleading uniforms and featured in Varsity's yearly catalogs. (Williams Decl. ¶ 6.)

15. When creating a design, Varsity's designers are not given instructions, limitations or guidelines from Varsity's production department. (Williams Decl. ¶ 8; Spencer Decl. ¶ 3.)

16. If a finished garment does not look like the designer's two-dimensional design, Varsity's production department is instructed to go back and try again to accurately portray the design. (Williams Decl. ¶ 8; Spencer Decl. ¶ 4; Williams Dep. at 62:13-15 ("[T]he basic instruction [to the pattern maker] is I want the uniform once the design is placed on it to look like my drawing.").)

17 The production department does not dictate what the design should be or how it should look. (Williams Decl. ¶ 8.) The placement and arrangement of the design elements, including angles,

stripes, lines, coloring, V's, curves, and shapes, etc., are not dictated by garment construction requirements. (Williams Decl. ¶ 8.)

18. Which elements to include in a design is within Varsity's designers' discretion and not dictated by any person in the production department. (Williams Decl. ¶ 8.)

19. What is designed and incorporated onto the surface of a garment is practically unlimited and can be designed to whatever degree of creativity is desired. (Williams Decl. ¶ 8.) When incorporating a design onto the surface of a garment by cutting and sewing, there is an almost limitless number of ways to arrange fabric panels (with and without braid) and sew them together to incorporate different designs onto cheerleading shell tops and skirts, or other garments. (Williams Decl. ¶ 8.)

20. It is not the objective of the design department in creating a design to make a garment more functional, but only to express creative thoughts and ideas in an original way through the combination and arrangement of elements. (Williams Decl. ¶¶ 5, 9; Ex. D Declaration of Susan Scafidi ("Scafidi Decl.") ¶ 16.)

21. The position and arrangement of the design elements is exercised by Varsity's designer independent of how such elements will affect the functionality, if any, of a garment if and when the designs are incorporated onto the surface of a garment. (Williams Decl. ¶ 9; Scafidi Decl. ¶ 15 ("I believe that the graphic designs created by Plaintiff, which consist of angled lines and geometric shapes in bold, solid colors, are independent of the functional dictates of the garments."); Ex. E Deposition of Susan

Scaifid ("Scafidi Dep.") 131:17 132:2 ("We have seen garments [in this case] with many different kinds of shapes [on the front]. So while it's necessary to have some structure and substance to a garment, these particular shapes are not necessary to the garment.").)

22. From a functionality standpoint, a blank silhouette uniform is no more or less functional than uniforms having each of the designs incorporated onto them. (Ex. F Declaration of Frances Harder ("Harder Decl.") ¶17.) In other words, it covers the body to the same degree, wicks away moisture, and withstands the rigors of cheerleading movements at least as much if not more than a garment that has a design on the front of it. (Scafidi Dep. at 132:18-23 ("When rendered in cloth, the entire garment covers the body, and that includes those panels. However, if there were no panels but merely a solid piece, it would still cover the body."); at 137:13-15 ("The color of the fabric is irrelevant to whether or not this is a garment that covers the body."); Harder Aff. ¶ 17 ("Whether the striping shown on the braid is located in one location or another or not at all has no bearing on the functionality of the garment covering the wearer...The striping shown on a piece of braiding and the seam underneath could be moved to a different location or arranged differently on the front of a shell top so that it does not portray any one of the designs at issue but the shell top could still be made to function the same way...The fit is the same for garments bearing the designs at issue (Garments VSC 036475-82) as it is for blank silhouette garments (Garments VSC 036512-16) because the outline or silhouette of the garment is the same.").)

23. When Amy Bailey and Kim Williams created Design 078, the lines, stripes, coloring, angles, V's and shapes and the arrangement and placement of those elements on the sketch was not the result of functional considerations or dictated by considerations as to the construction of any garments into which those designs may be incorporated. (Williams Decl. ¶ 10.)

24. The curves, lines, stripes, coloring, V's and shapes and placement and arrangement of those elements shown in Design 0815 was not dictated by construction requirements. (Williams Decl. ¶¶ 9-10.) In other words, the elements to be used, how to arrange them, and where to place them was not affected by issues of functionality of a garment or the method of construction of a garment incorporating those elements. (Williams Decl. ¶¶ 9-10.)

25. When Ms. Williams created Design 074, the sketch created was not dictated by garment construction considerations nor an attempt to make a garment more functional. (Williams Decl. ¶ 10.) In fact, the stripes, angles, V's, inverted V's, color scheme, and the shapes created by those elements in Design 074 could have been completely omitted or rearranged in an entirely different manner to form a different design altogether. (Williams Decl. ¶ 10.) Garment construction limitations would not limit the use, non-use, or rearrangement of those elements. (Williams Decl. ¶ 10.)

26. The same process as was used to create 0815, 078, and 074 was used to create Designs 299A and 299B. (Williams Decl. ¶ 9.)

27 Varsity incorporates designs onto the surface of several different types of garments, including

cheerleading uniforms and warm-up jackets, among others. (Spencer Decl. ¶ 5.)

28. There are different methods for incorporating the two-dimensional designs onto the surface of the garments, which may include cutting and sewing panels of fabric and braid together so that they display the design on the surface, sublimating the design by ink transfer onto the fabric which is later cut out so that the front and back may be sewn together, embroidering the design onto the fabric, and by screen printing. (Spencer Decl. ¶ 5; Harder Decl. ¶ 6.)

29. While any four of the methods may be used, Varsity primarily uses the methods of cut and sew and sublimation when incorporating a design onto the surface of cheerleading uniforms. (Spencer Decl. ¶ 6.)

30. Varsity has incorporated hundreds, likely over a thousand, different designs onto cheerleading shell tops and skirts by cutting and sewing. (Spencer Decl. ¶ 7.)

31 When a design is sublimated by Varsity's production department, the design is printed on a large piece of paper which is later fed through a sublimation machine along with a large piece of fabric. (Spencer Decl. ¶ 8.) The machine heats the ink on the paper to the point where it turns into a gas. (Spencer Decl. ¶ 8.) The ink, while it is in a gaseous state, is then infused into the fabric while the paper and fabric are being pressed together. (Spencer Decl. ¶ 8; Williams Dep. at 59:5-17 ("by what is called dye sublimation. It's by a heat-related process...Through heat, the dye is sublimated into the fabric....The design is basically printed on to the

fabric.").) After the paper and fabric are finished feeding through the machine, the large pieces of fabric have the designs on them which are then cut out and the outer edges are sewn together as a front and back of a garment. (Spencer Decl. ¶ 8.) When the designs at issue are sublimated, the striping on the sublimated uniforms is made up of ink and the color blocking is also ink. (Spencer Decl. ¶ 8.) Varsity's designs made be sublimated to several different types of materials, including polyester which is the same type of fabric that is used for most cut and sew garments. (Spencer Decl. ¶ 8.)

32. Each of the five Varsity designs at issue (0815, 299A, 299B, 074, and 078) can be and have been incorporated into cheerleading uniforms by sublimation. (Spencer Decl. ¶ 9; Williams Dep. at 54:5-7 & 56:24 57:3 ("could be made into a cut-and-sew garment, or it could be sublimated on to the garment, so infused into the fabric.").)

33. From 2005 to the present, Varsity has been offering sublimated cheerleading uniforms in its catalogs. (Ex. G Declaration of Brian Carroll ("Carroll Decl.") ¶ 6.) Varsity's sales of sublimated cheerleading uniforms is a quickly growing portion of Varsity's uniform sales. (Carroll Decl. ¶ 6.) In 2011, Varsity had over $600,000 in revenue generated from the sales of sublimated cheerleading uniforms. (Carroll Decl. ¶ 6.) In 2012, Varsity generated over $1,200,000 in sales revenue from the sale of sublimated cheerleading uniforms which included over 20,000 units. (Carroll Decl. ¶ 6.)

34. Collectively, the Varsity plaintiffs have obtained or acquired over 200 U.S. copyright registrations for two-dimensional designs which have been

reproduced on the surface of Varsity's cheerleading uniforms and other garments. (Carroll ¶ 3.) The copyright registrations are a matter of public record, and include, in addition to the registrations of the five designs at issue, Registrations Nos. VA 204-290; VA 204-291; VA 204-292; VA 204-293; VA 204-294; VA 204-295; VA 204-296; VA 204-297; VA 204-298; VA 204-299; VA 204-300; VA 204-301; VA 204-302; VA 204-303; VA 204-304; VA 204-305; VA 204-306; VA 204-307; VA 204-308; VA 204-309; VA 204-310; VA 204-311; VA 204-312; VA 204-313; VA 204-314; VA 204-315; VA 204-316; VA 204-317; VA 204-318; VA 204-319; VA 204-320; VA 204-321; VA 204-322; VA 204-323; VA 204-324; VA 204-325; VA 204-326; VA 204-327; VA 204-328; VA 204-329; VA 204-330; VA 204-331; VA 204-332; VA 204-333; VA 204-334; VA 204-335; VA 204-336; VA 223-012; VA 223-013; VA 223-014; VA 223-015; VA 223-016; VA 223-017; VA 223-018; VA 223-019; VA 223-020; VA 223-021; VA 225-575; VA 225-576; VA 225-577; VA 225-578; VA 225-579; VA 225-580; VA 225-581; VA 225-582; VA 225-583; VA 225-584; VA 1-319-222; VA 1-319-223; VA 1-319-224; VA 1-319-225; VA 1-319-227; VA 1-404-953; VA 1-404-954; VA 1-404-955; VA 1-404-956; VA 1-411-536; VA 1-411-626; VA 1-415-329; VA 1-428-450; VA 1-428-451; VA 1-428-452; VA 1-428-453; VA 1-428-454; VA 1-428-455; VA 1-428-456; VA 1-428-457; VA 1-428-458; VA 1-428-459; VA 1-428-460; VA 1-428-461; VA 1-428-462; VA 1-428-463; VA 1-428-464; VA 1-428-465; VA 1-428-466; VA 1-428-467; VA 1-428-468; VA 1-428-469; VA 1-428-470; VA 1-428-471; VA 1-428-692; VA 1-428-693; VA 1-428-694; VA 1-428-695; VA 1-428-696; VA 1-428-697; VA 1-428-698; VA 1-428-699; VA 1-428-700; VA 1-428-701; VA 1-428-702; VA 1-428-703; VA 1-428-704; VA

1-428-705; VA 1-428-706; VA 1-428-707; VA 1-653-799; VA 1-653-802; VA 1-653-804; VA 1-653-805; VA 1-653-807; VA 1-653-808; VA 1-653-810; VA 1-653-812; VA 1-653-814; VA 1-653-815; VA 1-653-816; VA 1-653-817; VA 1-653-819; VA 1-653-820; VA 1-667-030; VA 1-667-200; VA 1-667-372; VA 1-669-027; VA 1-669-144; VA 1-669-157; VA 1-669-159; VA 1-669-181; VA 1-669-182; VA 1-669-183; VA 1-669-186; VA 1-669-315; VA 1-669-319; VA 1-669-356; VA 1-669-411; VA 1-669-657; VA 1-669-774; VA 1-669-993; VA 1-670-515; VA 1-672-935; VA 1-673-704; VA 1-673-707; VA 1-673-708; VA 1-675-058; VA 1-675-059; VA 1-675-060; VA 1-675-061; VA 1-675-062; VA 1-675-063; VA 1-675-064; VA 1-675-065; VA 1-675-069; VA 1-675-071; VA 1-675-072; VA 1-675-073; VA 1-675-790; VA 1-675-834; VA 1-675-853; VA 1-675-871; VA 1-675-879; VA 1-675-883; VA 1-675-885; VA 1-675-888; VA 1-675-891; VA 1-675-896; VA 1-675-898; VA 1-675-899; VA 1-675-900; VA 1-675-901; VA 1-675-902; VA 1-675-903; VA 1-675-904; VA 1-676-953; VA 1-689-922; VA 1-694-242; VA 1-712-125; VA 1-712-126; VA 1-712-127; VA 1-712-128; VA 1 712-129; VA 1-712-130 (Supplemental: VA 1-432-015); VA 1-712-131; VA 1-712-132; VA 1 712-133; VA 1 717-527; VA 1-720-317; VA 1-774-922; VA 1-774-924; and VA 1-774-926. (Carroll Decl. ¶ 4; *see* Copyright Office online Public Catalog, http://cocatalog.loc.gov.)

35. Fifty-one of these registrations were obtained after first receiving a refusal to register from the Copyright Office. (Carroll Decl. ¶ 5.)

36. Attached as Exhibit A to Mr. Carroll's declaration are true and correct copies of correspondence received from the Copyright Office dated October 19, 2007, October 20, 2008, and February 19, 2009 allowing the registration, after an initial refusal to

register, of Varsity's designs, namely design nos. WS0632FA, WMD0631FA, WS0629FA, WS0627RA, WS0625A, WS0624FA, WS0623A, WS0622RA, WS0617A, WS0051A, WS0516A, MFBL065W, MFBLR0643M, WS0629A, WS0819A, WS0618A, WS0613A, WH0613A, WS0610A, WS065FA, WH064A, WS060A, 0646, WS0612A, 067, WS068A, WH0614A, WS0516A, BB10, BB9, MFBL0515W, MFBL0642W. WS0640RA, WS0638A, WS0637A, WS0636A, WH0635A, WH0634A, 522, 059, 535, 017, 242, 057, 9213, 9314, 043, 0410, 538, 529, 801, and 0644. (Carroll Decl. ¶ 5 & Ex. A thereto.)

37 The Copyright Office found, as set forth in the Exhibit A to Mr. Carroll's Declaration that after carefully reviewing each design, there was a sufficient amount of original, creative and separable artistic or graphic authorship on the surface of each design to support a copyright registration. (Carroll Decl. ¶ 5.) True and correct copies of the deposit materials which Varsity submitted to the Copyright Office for each of the designs listed in the paragraph above are attached as Exhibit B to Mr. Carroll's Declaration. (Carroll Decl. ¶ 5 & Ex. B thereto.)

38. Star's expert testified as follows: "I think under Varsity's right, it can prohibit this law firm from reproducing those designs in two dimension and putting them on this wall. So I think that right is enforceable, and I have no problem with that." (Ex. H Deposition of Antonio Sarabia ("Sarabia Dep.") at 198:20-24.)

39. Star's expert acknowledges that designs incorporated into garments by "screen printing, weaving or embroidering" are designs which a "company could obtain a copyright registration for"

and are "legitimate uses of copyright protection in connection with apparel." (Ex. I Sarabia 1st Expert Report at 3.)

40. Varsity's designs have a likelihood of being independently marketable. (Scafidi Decl. ¶ 17 ("As graphic designs, Plaintiff's copyrighted works have potential commercial value apart from their incorporation into articles of apparel. They could be applied to painted canvases, tote bags, notebooks, iPhone covers, or any number of consumer goods as easily as to women's sleeveless tops and skirts."); (Scafidi Dep. at 197:1-24; Scafidi Decl., Exhibit 3 thereto.)

41. Kerry Leake is a former employee of Varsity. (Carroll Decl. ¶ 8.) His employment terminated at the end of December 2009. (Carroll Decl. ¶ 8.)

42. During the entire time Kerry Leake was an employee of Varsity, he had access to all of Varsity's catalogs from at least 1998 up until the time of his departure from Varsity in December 2009. (Carroll Decl. ¶ 8.)

43. Each of the designs at issue (0815, 078, 074, 299A and 299B) were published while Kerry Leake was an employee of Varsity. (Carroll Decl. ¶ 8; Williams Decl. ¶ 5.)

44. Varsity distributes thousands of copies of its catalog each year to members of the cheerleading industry. (Carroll Decl. ¶ 9.) Additionally, for each year since around 2001, Varsity has made available on its website an electronic copy of its catalog during each of those years which can be accessed by visiting Varsity's website. (Carroll Decl. ¶ 9.)

45. During a meeting in November 2009 at St. Louis, Missouri, Jimmy Liebe, Bill Liebe, and Kerry Leake reached a verbal understanding that Kerry

Leake would receive a salary of $125,000 a year for his work for a cheerleading apparel company which they agreed to form. (Ex. J Deposition of Kerry Leake ("Leake Dep.") at 44:24-46:8).

46. Bill Liebe emailed Kerry Leake on November 30, 2009, to discuss the possibility of starting Star, including the initial investment costs and Kerry Leake's ownership percentage. (Leake Dep. at 225:23-227:25 & Ex. 28 to Leake Dep.: November 30, 2009 Email from Bill Liebe to Kerry Leake.)

47. From as early as April 2010 and through at least April 2012, Kerry Leake has had a Star email address which is Kerry.leake@starathletica.com. (Leake Dep. at 53:4-21.)

48. From April 2010 through at least April 2012, the date of his deposition, Kerry Leake had used the @starathletica.com email address almost every day to communicate with independent reps for Star regarding the sales and manufacturing of uniforms. (Leake Dep. at 56:7-58:19.)

49. Kerry Leake frequently contacted manufacturers, suppliers, and representatives on behalf of Star. (Leake Dep. at 74:17-75:8.)

50. In his role in fulfilling orders, Kerry Leake would receive customer requests from Star's independent sales representative, and then Kerry Leake would supply the garment for Star. (Liebe Dep. at 126:15-127:7.)

51. Rebecca Cook entered into an employment agreement, which included a non-compete agreement, with Varsity. (*See* Joint Statement of Facts ¶ 60.)

52. Kerry Leake was informed that Rebecca Cook had an employment agreement with Varsity that

was in existence during March 2010. (Leake Dep. at 80:20-83:12.)

53. As early as February 4, 2010, Bill Liebe and Kerry Leake contemplated whether Rebecca Cook had a non-compete agreement with Varsity. (See Joint Statement of Facts ¶ 68aaaa.)

54. After Rebecca Cook was hired as an independent sales representative for Varsity, Bill Liebe and Rebecca Cook discussed the fact that she received a cease and desist letter from Varsity "saying that she could be in violation of her severance agreement, and that she could not do -- sell cheerleading or work for any cheerleading within 200 miles of her territory." (Ex. K Deposition of Bill Liebe ("B. Liebe Dep.") at 111:21-113:14; Ex. L Deposition of Rebecca Cook ("Cook Dep."), Ex. 5 thereto: Email from Rebecca Cook to Varsity's Counsel, bates numbered Cook 00005.)

55. Star's independent sales representatives have included former employees of Varsity, such as Michele Radon, Ray Lyons, and Linda DeMoss. (B. Liebe Dep. at 114:3-120:25.)

56. Kerry Leake testified that the same week he drew the patterns for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog he visited Varsity's website as part of his "research." (Leake Dep. at 164:3-165:11; 166:4-14.)

57. Kerry Leake had Kimro Manufacturing manufacture the Star cheerleading uniforms based upon the patterns he testified he drew for the cheerleading uniforms which were later photographed and displayed in Star's 2010 catalog. (Leake Dep. at 156:13-157:9.)

58. Bill Liebe, Star's sole manager, testified that Leake was responsible for selecting which uniforms to be displayed in Star's 2010 catalog; Liebe approved the uniforms to be displayed in that catalog. (B. Liebe Dep. at 138:11 139:4; Leake Dep. at 156:13-19.)

59. Except the circles around the accused uniforms (for ease of reference for the Court), true and correct copies of pages 22-23, 18-19, 14-15, 24-25, and 4-5 from Star's 2010 catalog are attached hereto as Exhibits M.

60. Within months after her employment with Varsity, Rebecca Cook began working for Star as an independent sales representative. (Joint Statement of Facts ¶¶ 58, 60; Cook Dep. at 12:25-13:22.)

61 As an independent sales rep for Star, Cook focused her sales area around her home in Nesbit, MS, (Cook Dep. at 15:10-16:16), a town approximately 22 miles from Memphis.

62. Cook testified that she independently marketed for Star between October 2009 and May 2011, and did office work and training, describing her work with Star between October 2009 and May 2011 as including helping "work with someone that had never done anything in sales." She "might give them [her] experience in sales as a how to get your -- get your own accounts." (Cook Dep. at 19:23-20:7; 21:13-18.)

63. Between October 2009 and May 2011, Cook traveled to Texas to train Star's independent sales representatives at the request of Kerry Leake. (Cook Dep. at 21:3-7, 22:12-24:7.)

64. Between October 2009 and May 2011, Cook was compensated by Star for "the value" of "what-

ever portions of whatever [she] did with people." (Cook Dep at 221:3-7, 25:16-22.)

65. Cook would receive a call from the independent sales rep and would then meet with him or her to train that sales rep for work with Star. (Cook Dep. at 26:19-27:9.)

66. On February 24, 2010, Cook sent an email to the contacts in her address book to inform them she was now a sales person for Star Athletica. (Cook Dep. at 60:16-61:18 & Exhibit 7 thereto: February 24, 2010 Email from Rebecca Cook to her emails contacts.)

67. In her February 24, 2010 email to her contracts in her address book, Cook informed her customers that "if you have a garment style already, we will make it." (Cook Dep. at 63:7-22 & Exhibit 7 thereto: February 24, 2010 Email.)

68. On February 26, 2010, counsel for Varsity mailed and emailed Cook a letter regarding her violation of her Sales Representative Agreement with Varsity and reminding Cook of her non-compete agreement with Varsity. (Cook Dep. at 39:22-40:15 & Exhibit 4 thereto: February 26, 2012 Letter from Varsity's Counsel, bates numbered Cook 00002-4.)

69. Counsel for Varsity followed that letter with another letter on March 2, 2010. (Cook Dep. at 38:9-25 & Exhibit 3 thereto: March 2, 2010 Letter from Varsity's Counsel, bates numbered SALEAKE 000430-000444.)

70. Cook testified that she did not receive a letter from Varsity's counsel regarding her non-compete agreement with Varsity and alleged that as of March she "had already stopped and wasn't doing anything." (Cooke Dep. at 38:9-25.)

71. On March 1, 2010, Cook emailed Leake requesting price quotes for uniforms from the Varsity catalog for Star to reproduce uniforms like those displayed in Varsity's catalog. (Ex. N Documents bates-numbered SALEAKE 000418, 000421, and 000427: Email communications between Rebecca Cook and Kerry Leake, dated March 1, 2010.)

72. Also, on March 1, 2010, Bill Liebe emailed Cook to thank her for the meeting on February 28, 2010, and to express his excitement about working with her. (Cook Dep. at 65:12-66:22 & Exhibit 8 thereto: March 1, 2010 Email from Bill Liebe to Ray Hoffman, Rick Hoffman, Rebecca Cook, and Kerry Leake, bates number SALEAKE 000416.) This contradicts Cook's statement that she had not met Bill Liebe as of February 2010. (Cook Dep. at 59:15-21.)

73. On March 1, 2010, Cook emailed Leake in regard to a price quote for Independence High School of Independence, Mississippi. (Cook Dep. at 111:23-113:25 & Exhibit 15 thereto: Email from Rebecca Cook to Kerry Leake, dated March 1, 2010, bates numbered SALEAKE 000419.) Independence, Mississippi is approximately 43 miles from Memphis, Tennessee.

74. On March 1, 2010, Cook forwarded the February 26, 2010 email she received from Varsity's counsel to Leake and Bill Liebe. (Cook Dep. at 69:21-70:22 & Exhibit 9 thereto: March 1, 2010 Email from Rebecca Cook to Leake and Bill Liebe, bates numbered SALEAKE 000412.)

75. On March 2, 2010, Cook forwarded the March 2, 2010 email she received from Varsity's counsel to Leake and Bill Liebe. (Cook Dep. at 72:2-73:13 & Exhibit 10 thereto: March 2, 2010 Email from

Rebecca Cook to Leake and Bill Liebe, bates numbered SALEAKE 00429.)

76. Cook continued working in sales for Varsity as late as March 30, 2010, "training someone else to learn how to do this sales job." (Cook Dep. at 77:23-78:23 & Exhibit 11 thereto: Email exchange between Rebecca Cook and Kerry Leake, dated March 29 and 30, 2010, document bates numbered SALEAKE 000551.)

77 In March and April 2010, Cook helped Star's independent sales representatives create and maintain contact lists. (Cook Dep. at 80:3-18, 83:5-85:24 & Exhibits 11 and 12 thereto: Email exchange between Rebecca Cook and Kerry Leake, dated March 29 and 30, 2010, document bates numbered SALEAKE 000551 and Email exchange between Rebecca Cook, Tim Liebe, and Kerry Leake, dated April 19 and 21, 2010, document bates numbered Star05284-05285, respectively.)

78. Cook possessed a Varsity Training Manual that included Varsity's Customer Master Report and provided the manual to Star. (Cook Dep. at 91:15-19.)

79. In May 2010, Cook worked with Star's independent sales representative Debra Black in selling uniforms to Woodland Middle School. (Cook Dep. at 104:12-107:7 & Exhibit 13 thereto: Email exchange between Kerry Leake, Rebecca Cook, and Debra Black, dated May 5 to 3, 2010, bates numbered Star00497-99.)

80. Bill Liebe emailed Kerry Leake on November 30, 2009, to discuss the creation of Star. (Leake Dep. at 225:23-226:18 & Ex. 28 thereto; *see also* Joint Statement of Facts ¶ 68eee: email from Bill Liebe to

Kerry Leake and Jimmy Liebe, dated November 30, 2009, Bates stamped SALEAKE 000003.)

81. On May 3, 2010, Star independent sales representative Debra Black emailed Leake in regard to Woodland Middle School's request for two uniforms in Varsity's catalog, and Leake testified that Star "probably did something very similar to [the requested Varsity uniform]," i.e., created a uniform very similar to the requested Varsity uniform. (Leake Dep. at 179:9-182:4 & Exhibit 4 thereto: Email exchange between Debra Black, Kerry Leake, Rebecca Cook, and Bill Liebe, dated May 3 and 5, 2010, document bates numbered Star00497-00499.)

82. On June 18, 2010, Leake emailed Star independent sales representative Missy Mink to inform her that Star "can make anything in varsity catalog." (Leake Dep. at 212:4-213:3 & Ex. 21 thereto; see also Joint Statement of Facts ¶ 68xx: email from Missy Mink to Kerry Leake, dated June 18, 2010, Bates stamped STAR 04985.)

83. On May 31, 2011, Radon emailed to request that Leake produce pictures of uniforms from Varsity's 2011 catalog for a customer that requested Varsity uniforms, which Leake testified he did. (Leake Dep. at 194:10-195:15 & Ex. 12 thereto; see also Joint Statement of Facts ¶ 68oo: email exchange between Michele Radon and Kerry Leake, dated May 31, 2011, Bates stamped STAR 03999-04000.)

84. Leake was the sole provider of cheerleading uniforms to Star. (Cite)

85. Leake's acting as the sole provider of cheerleading uniforms to Star violates his non-compete obligations owed to Varsity. (Leake Dep. 156:17 157:9) A true and correct copy of Leake's employment

agreement with Varsity is attached as Exhibit O hereto.

86. Leake and Star were clearly aware of Leake's non-compete obligations as evidenced by the correspondence sent to Leake and between Leake and Bill Liebe. (JSUF ¶ 68fffff; B. Liebe, Ex. 34 thereto.)

87. The facts relating to Michelle Radon and Rebecca Cook, Star's independent sales representatives, who are former sales representatives for Varsity, are similar. (JSUF ¶ 60; Cook Dep., Ex. 1 thereto.)

Respectfully submitted,

s/ Adam S. Baldridge

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EXHIBIT A
to Varsity's Statement of Undisputed Facts

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC., Plaintiffs, v. STAR ATHLETICA, L.L.C., Defendant.	)	No.: 2:10-cv-02508-RHC-cgc **FILED UNDER SEAL**

DECLARATION OF GARY SPENCER

I, Gary Spencer, declare as follows:

1. My name is Gary Spencer. I am the Vice President of Production of Varsity Spirit Corporation, one of the plaintiffs in the above-captioned case. I am over the age of 18 and have personal knowledge of the facts stated herein.

2. Varsity employs designers to create two-dimensional designs. I manage the Production Department, which is the portion of the company that is responsible for incorporating designs onto the surface of different types of garments. The

Production Department includes pattern makers, sample room workers, and the sublimation production department, among others.

3. Varsity's lead designer, Kim Williams, will sketch a new design. When the design is to be displayed on a cut and sew garment, it is the pattern makers' job, who work in my department, to determine how to display the design on the surface of a garment. In the case of sublimated designs, the sublimation department (which is also included in my department) determines how to apply the ink to a blank piece of fabric so that it accurately displays the design. Neither Ms. Williams nor Varsity's other designers are given direction from the production department nor provided particular limitations from the Production Department when creating a new design. The design department, of which Ms. Williams is the head, is not included within the Production Department.

4. If the finished garment does not look like the designer's design, the designer (which is often Kim Williams) will reject the finished garment and instruct the pattern makers or sublimation department in my department to start over and try again to accurately represent the design. Kim Williams has never amended her design in that situation. Instead, the production department goes back and tries again to accurately represent the design on the surface of the garment.

5. Varsity incorporates designs onto the surface of several different types of garments, including cheerleading uniforms and warm-up jackets, among others. There are different methods for incorporating the two-dimensional designs onto the surface of the

garments, which may include cutting and sewing panels of fabric and braid together so that they display the design on the surface, sublimating the design by ink transfer onto the fabric which is later cut out so that the front and back may be sewn together, embroidering the design onto the fabric, and by screen printing.

6. While any four of the methods may be used, Varsity primarily uses the methods of cut and sew and sublimation when incorporating a design onto the surface of cheerleading uniforms. The method of incorporating a design onto the surface of a uniform by cutting and sewing involves arranging panels of fabric and striped braid and sewing them together a way so that they look like the design.

7. Since I have been the Vice President of Production, Varsity has incorporated hundreds, indeed likely over a thousand, different designs onto cheerleading shell tops and skirts by cutting and sewing.

8. When a design is sublimated, the design is printed on a larger piece of paper which is later fed through a sublimation machine along with a large piece of fabric. The machine heats the ink on the paper to the point where it turns into a gas. The ink, while it is in a gaseous state, is then infused into the fabric while the paper and fabric are being pressed together. After the paper and fabric are finished feeding through the machine, the large pieces of fabric have the designs on them which are then cut out and the outer edges are sewn together as a front and back of a garment. When the designs at issue are sublimated, the striping on the sublimated uniforms is made up of ink and the color blocking is

also ink. Varsity's designs made be sublimated to several different types of materials, including polyester which is the same type of fabric that is used for most cut and sew garments.

9. Each of the five Varsity designs at issue (0815, 299A, 299B, 074, and 078) have been incorporated into cheerleading uniforms by sublimation. Attached to this declaration as Exhibit A are samples of sublimated uniforms which display each of the designs at issue. These sublimated uniforms were created by Varsity under my supervision and are the same as the sublimated uniforms previously provided to counsel for Star Athletica in this case. For further visual explanation regarding the process of sublimation, I have attached as Exhibit B large pieces of fabric displaying the designs at issue after the fabric has been fed through Varsity's sublimation machine and before the front and back are sewn together to form a garment.

10. Embroidering a design involves a process by which a design is created on a piece of fabric by sewing thread back and forth through the fabric. Although each of the designs at issue could be embroidered, Varsity does not.

11. Screen printing involves the use of a polyester screen mesh and ink is pressed through the mesh using a fill blade or a squeegee to create the design on the surface of the fabric.

12. Varsity has also manufactured blank white uniforms which have the same silhouette, i.e. outer shell, as the uniforms bearing the designs at issue in the case but do not display a design. Those blank white silhouette garments are attached to this

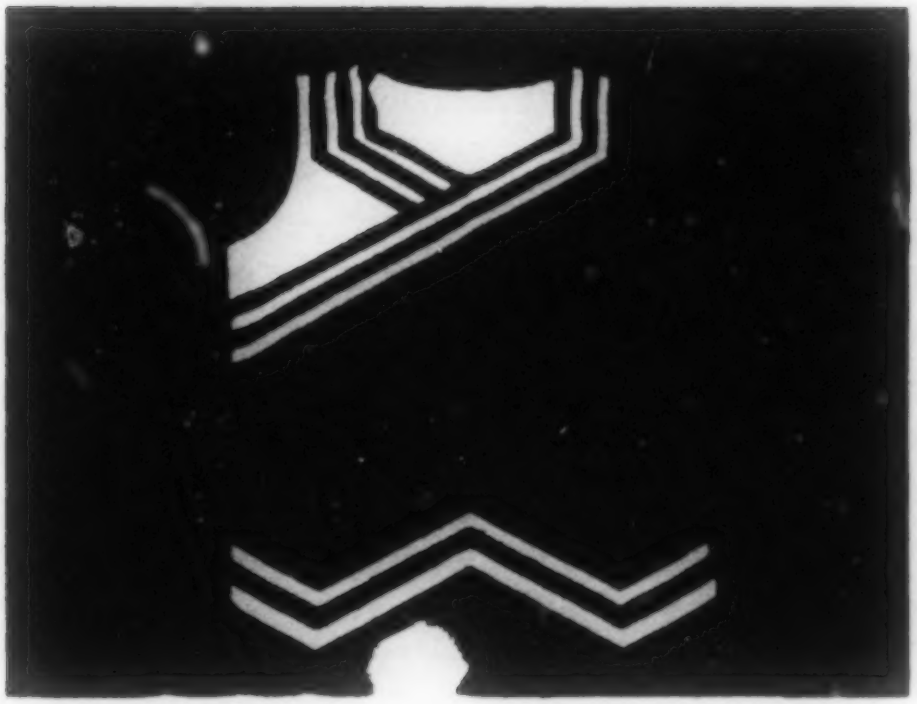
declaration as Exhibit C, and those blank white silhouette garments were manufactured by Varsity under my supervision and are the same as the blank white silhouette garments previously provided to Star Athletica in this case.

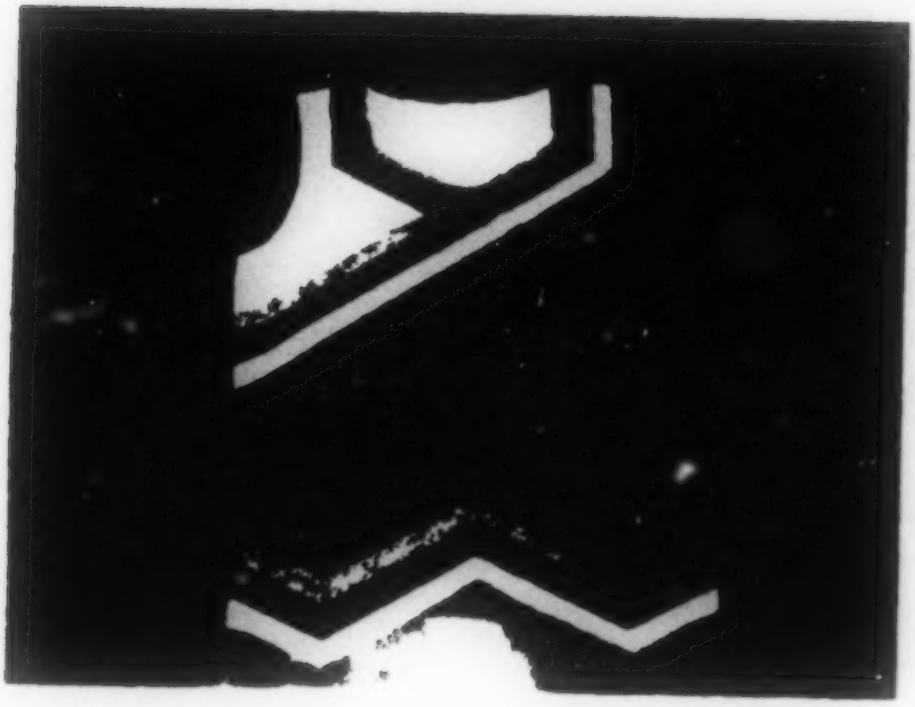
13. Varsity has also manufactured warm-ups and jackets which display the designs at issue in this case. Several of those warm-ups and jackets are attached to this declaration as Exhibit D. The attached warm-ups and jackets were manufactured by Varsity under my supervision and are identical to the warm-ups and jackets previously provided to Star Athletica.

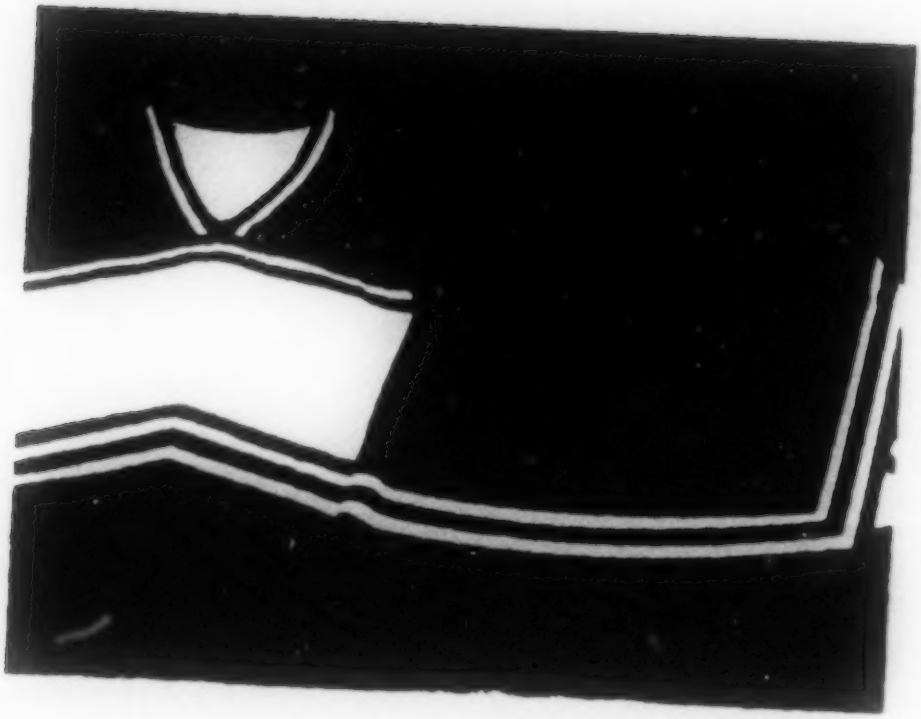
I declare under penalty of perjury that the foregoing is true and correct.

s/
GARY SPENCER

Exhibit A







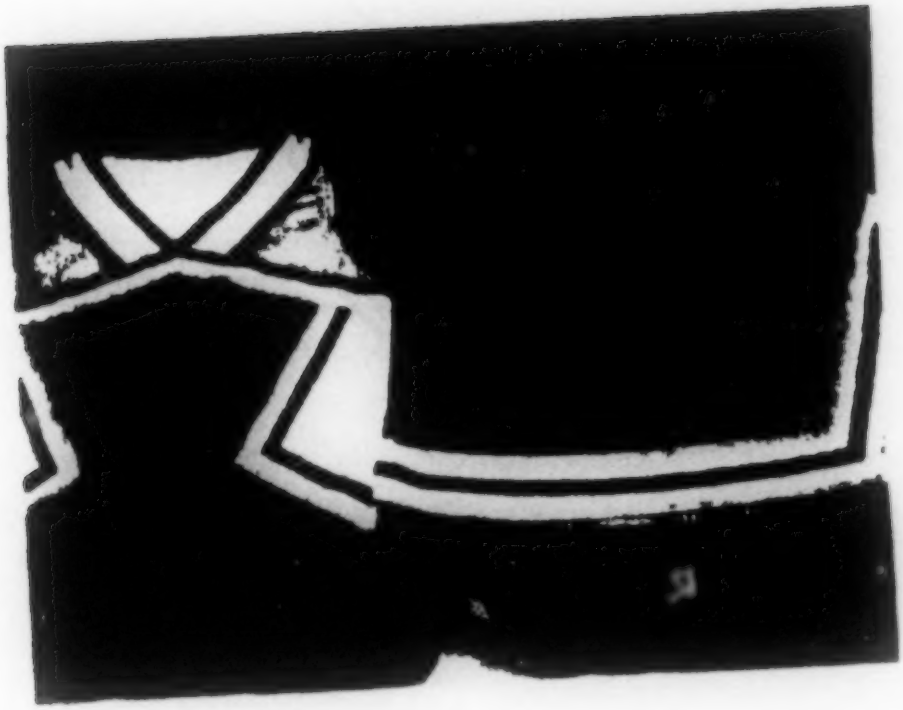


Exhibit B

Exhibit C

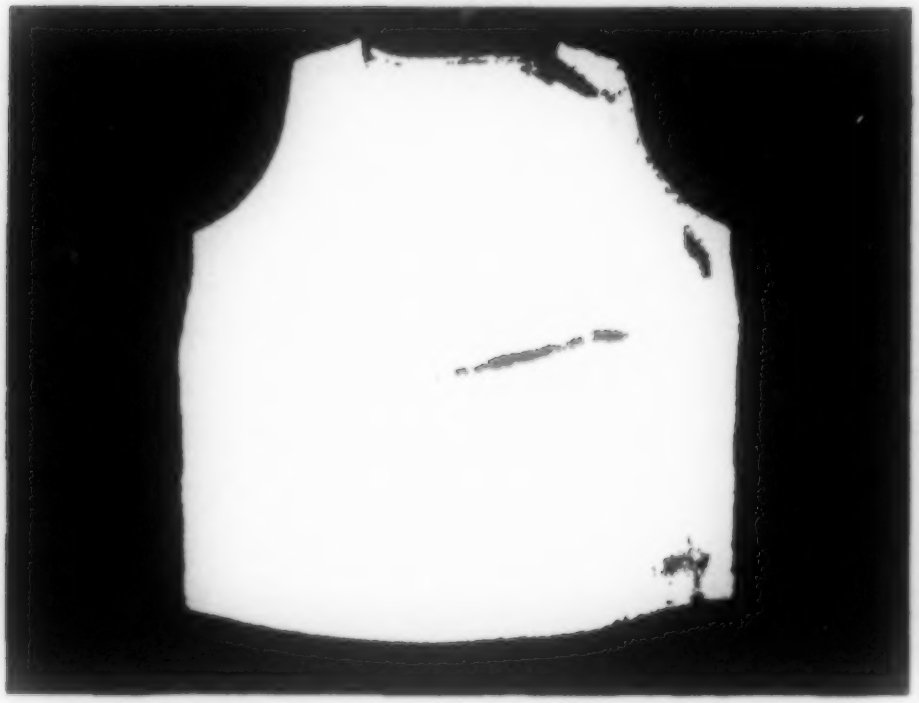
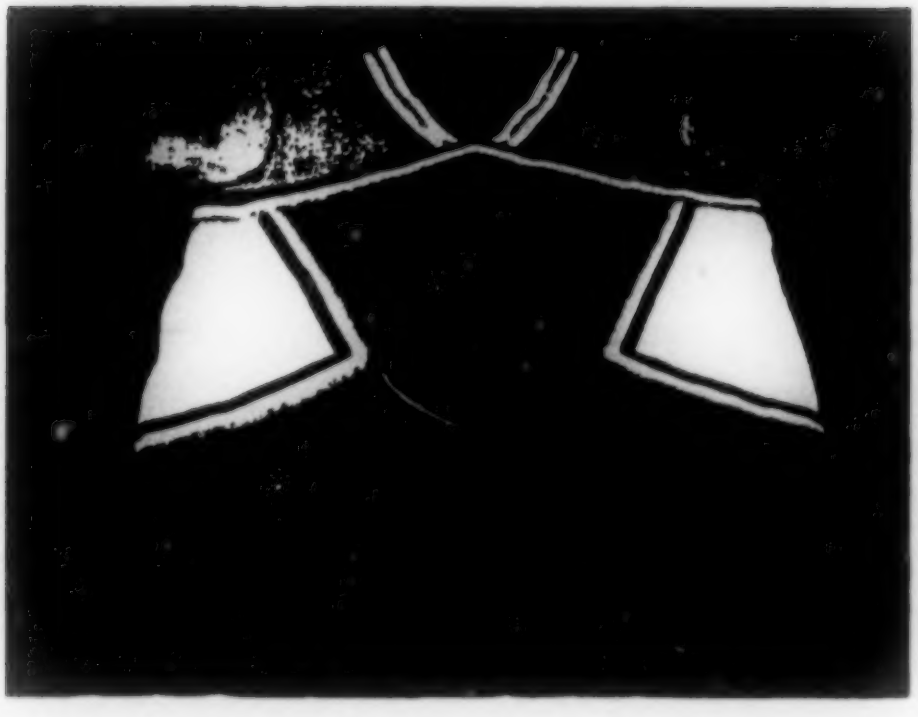
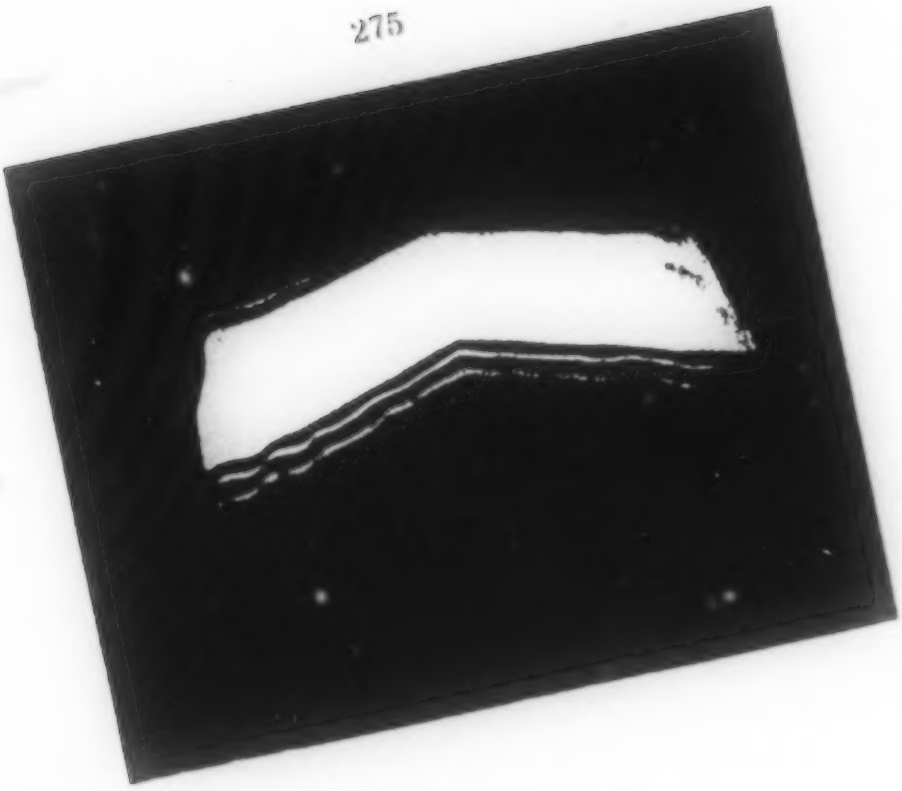
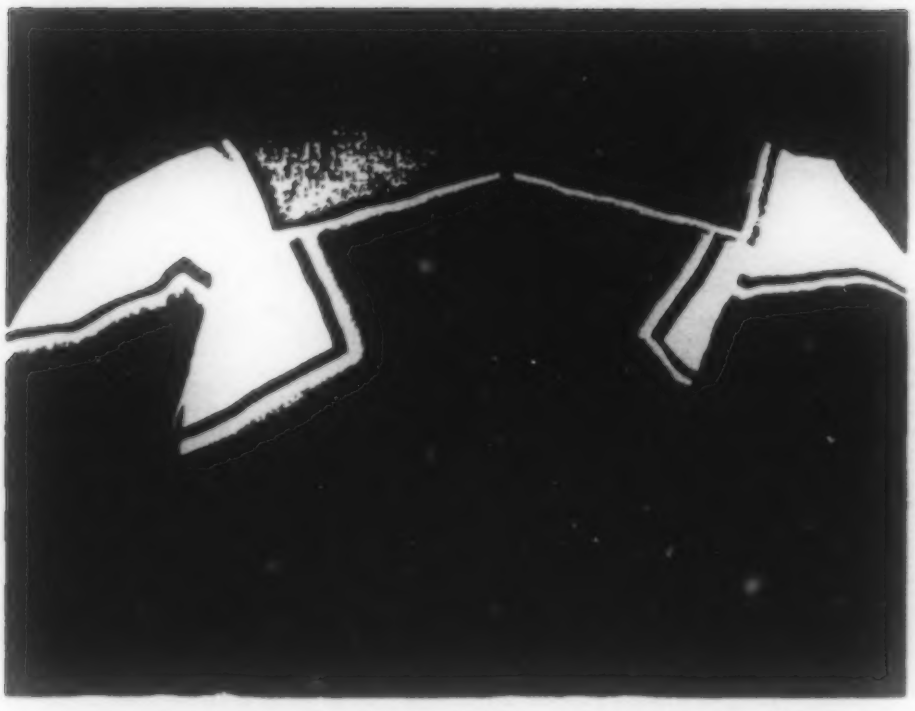
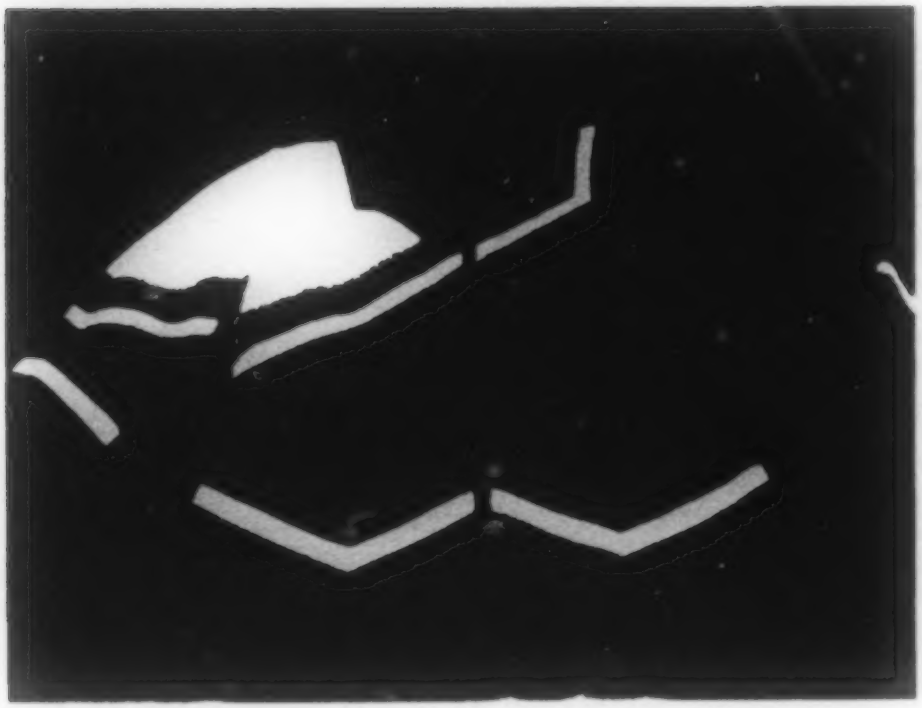


Exhibit D









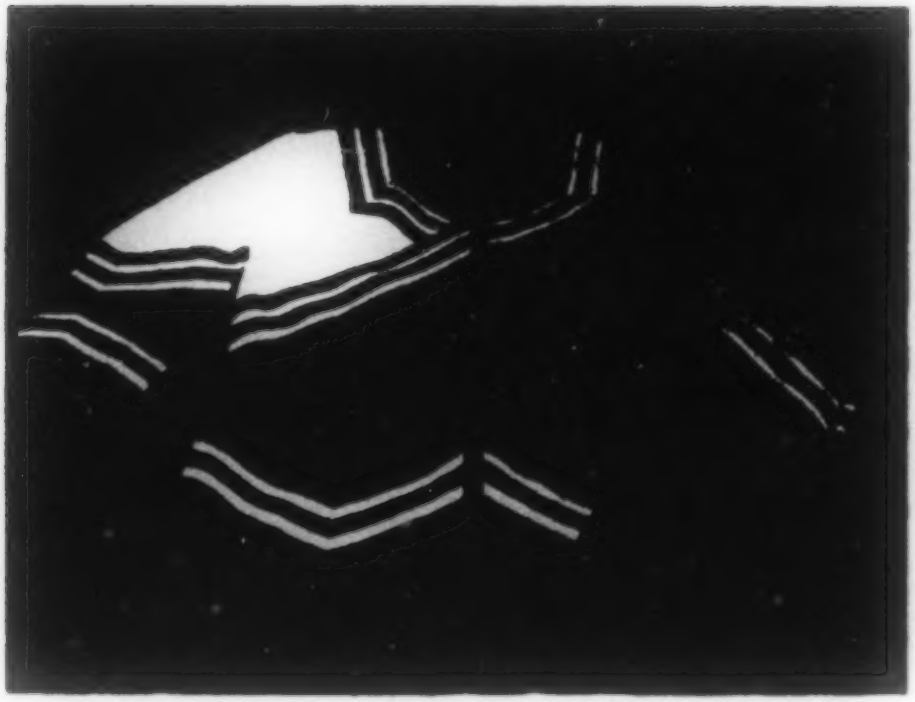


EXHIBIT B
to Varsity's Statement of Undisputed Facts

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC., Plaintiffs, v. STAR ATHLETICA, L.L.C., Defendant.	)	No.: 2:10-cv-02508-RHC-cgc **FILED UNDER SEAL**

DECLARATION OF KIMBERLY WILLIAMS

I, Kimberly Williams, declare as follows:

1. My name is Kimberly Williams, and I am the Vice President of Design and the lead designer for the Varsity plaintiffs in the above-captioned case. I am over the age of 18 and have personal knowledge of the facts stated herein.

2. I have been the lead designer since 1999 and thereafter became the Vice President of Design. Before I became the lead designer for Varsity, Kraig Tallman, a former Varsity employee who is now deceased, was the lead designer.

3. Me and my talented and creative design team, who work under my direction, create new and original two-dimensional designs which may be incorporated onto the surface of a number of different types of garments, including cheerleading uniforms, practice wear, t-shirts, warm-ups, and jackets, among other things. I am also responsible for creating and developing Varsity's catalogs each year and for helping Varsity seek and obtain copyright registrations for its original designs when appropriate.

4. The designs created by me and my team are sketched on pieces of paper as two-dimensional artwork. The two-dimensional designs created by me and my team, like Designs 0815, 074, 078, 299A, and 299B, include the selection, placement, and arrangement of elements, such as stripes, lines, chevrons, inverted chevrons, angles, curves, coloring, and shapes, etc.

5. I personally was involved with three of the five Varsity designs that are at issue in this lawsuit: Designs 0815, 078 and 074. Varsity's 0815, 078, and 074 designs at issue all originated as sketches on pieces of paper. At no time when I sketched those designs nor anytime thereafter was I trying to increase the functionality of any garment or anything else onto which the designs may be incorporated. Kraig Tallman, my predecessor, was involved with the other two Designs 299A and 299B. I sketched Design 0815 in 2007. As an illustration of how I sketch, attached as **Exhibit** A is a true and correct copy of a collection of sketches that were sketched at the same time and in conjunction with the sketch of Design 0815. These sketches are

kept in Varsity's records, specifically the design book, which are and have been in my custody as Varsity's lead designer and Vice President of Design. Design 0815 was first published in Varsity's 2008 catalog, with the design being displayed on the surface of an uniform. Designs 078 and 074 were first published in Varsity's 2007 catalog, with those designs being displayed on the surfaces of uniforms. Designs 299A and 299B were first published in January 1999, with those designs being displayed on the surface of cheerleading uniforms shown in Varsity's 1999 catalog. Designs 0815, 078, 074, 299A and 299B have been incorporated onto the surface of cheerleading uniforms by sublimation and by cutting and sewing fabric and braid in a manner that displays the designs. Several of these designs have also been displayed on jackets and warm-ups. In the instance of a cut and sew uniform, the braid is simply one way of displaying the stripe portion of a design, like ink applied to display the stripe portion of a design on a sublimated uniform. Thus, braid does not have to be used in a cheerleading uniform. In other words, the lines in a design (which would form stripes) are not drawn because braid must be used in a uniform.

6. Each year, my design team creates over 100 different two-dimensional designs. Not all of these designs will be used. At the time a sketch is created by me or one of my designers, it is not known if the design will be used on a garment. It is also unknown whether the design will be implemented by sublimation or cut and sew. In fact, only a portion of the designs are selected to be incorporated onto the surface of cheerleading uniforms and are featured in Varsity's yearly catalogs. The designs that are not

selected usually never get incorporated onto the surface of cheerleading uniforms.

7. Over several decades, Varsity has obtained copyright registrations for a number of the designs created by Varsity. Some of Varsity's copyright registrations date back to the mid 1980's. From 1985 to present, Varsity has obtained over 200 copyright registrations for designs which may be incorporated into articles such as cheerleading and other garments.

8. When creating a design, neither my designers nor I are given instructions, limitations or guidelines from the production department. In fact, if a finished garment does not look like the two-dimensional design, the production department is instructed to go back and try to accurately portray the design. In other words, neither my designers nor I change our design. The production department does not dictate what the design should be or how it should look. The placement and arrangement of the design elements, including angles, stripes, lines, coloring, V's, curves, and shapes, etc., are not dictated by garment construction requirements. What elements to include in a design is completely within my and my designer's discretion and not dictated by any person in the production department. Naturally, when the design is incorporated onto a garment, there are edges of the garments which operate like the edge of a canvas so the design is scaled to fit within the edges of the garment. For example, the very same design can be incorporated onto the surface of a shell top which has no sleeves or collar can be incorporated onto the surface of a jacket which has sleeves and a collar. However, what is drawn within

those edges is practically unlimited and can be designed to whatever degree of creativity is desired. When incorporating a design onto the surface of a garment by cutting and sewing, there is an almost limitless number of ways to arrange fabric panels (with and without braid) and sew them together to incorporate different designs into cheerleading shell tops and skirts, or other garments.

9. It is not the objective of the design department in creating a design to make a garment more functional, but only to express creative thoughts and ideas in an original way through the combination and arrangement of elements. The position and arrangement of the design elements is exercised by me and my team wholly independent of how such elements will affect the functionality, if any, of a garment if and when the designs are incorporated onto the surface of a garment. As I noted in my deposition, a "design placed on the uniform will not affect the fit of a uniform. We use a standard base regardless of the design that is placed on that uniform." (Page 23, line 4-11.)

10. Specifically, when Amy Bailey and I created Design 078, the lines, stripes, coloring, angles, V's and shapes and the arrangement and placement of those elements on the sketch was not the result of functional considerations or dictated by considerations as to the construction of any garments into which those designs may be incorporated. It is same with Design 0815 the curves, lines, stripes, coloring, V's and shapes and placement and arrangement of those elements was not dictated by any construction limitations. In other words, the elements to be used, how to arrange them and where to place them was

not affected by issues of functionality of a garment or the method of construction of a garment incorporating those elements. Similarly, when I created Design 074, the sketch created was not dictated by garment construction considerations nor an attempt to make a garment more functional. In fact, the stripes, angles, V's, inverted V's, color scheme, and the shapes created by those elements in Design 074 could have been completely omitted or rearranged in an entirely different manner to form a different design altogether. Garment construction limitations would not limit the use, non-use, or rearrangement of those elements. With regard to Design 299A and Design 299B, the same is true. Kraig Tallman was involved with the creation and illustration of those designs as two-dimensional sketches. Attached as Exhibit B is a true and correct copy of the two-dimensional sketch from Varsity's design files which includes Kraig Tallman's 299 sketch. As I noted above, I am the custodian of Varsity's design files.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 1, 2013 s/_____

Kimberly Williams

Exhibit A

EXHIBIT C
to Varsity's Statement of Undisputed Facts

In The Matter Of:
Varsity Brands vs.
Star Athletica

Kimberly Williams
April 12, 2012

Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
901-523-8974

Original File 176231n.txt

MR. CROSBY: You continue.
BY MR. NAGAMPALI:
Q. My question was, is there anything apart from the design placed on a cheerleading uniform and quality that the customers look for in a cheerleading uniform?
A. I'm sure there are other issues involved in their buying decisions, but in selecting the uniform they want, they're typically looking at the design that is on the uniform and then the quality of the uniform.
Q. Could you walk me through the steps of customer selection of the uniform to placing an order with Varsity.
A. That again will vary by customer. In my experience the coach would throw out the catalog to all the kids, say, look through it, which design do you -- that is placed on the uniforms do you like the most. And kids will look through the book and choose the design that is most aesthetically pleasing to them.
Q. What is "aesthetically pleasing"?
A. The one that looks the best.

Q. Then what happens?
A. Then their sales rep will size them for

their uniform, and they will take all the information regarding color setup and sizing and enter that order.
Q. When you say "size them," would you say the fit varies with a design in the catalog?
MR. GARRISON: Object to the form of the question.
A. A design placed on the uniform will not affect the fit of a uniform. We use a standard base regardless of the design that is placed on that uniform.
Q. Okay.
A. So the -- go ahead.
Q. So after the sizing and the design is selected, it remains -- it's placed in an order, and is there anyway the customer can make any changes to this design from a catalog?
MR. GARRISON: Objection to the form of the question.
A. Is there any way they can make a change to the design?
Q. Let me rephrase that. When a customer

23 selects a design from the catalog.
24 A. Yes.
25 Q. Could they get back to the sales rep and

1 sold
2 Q. After Mr. Tallman's passing, how was the
3 line developed at Varsity?
4 MR. GARRISON: I'm sorry, I didn't
5 hear -- I didn't understand your question. What
6 was your question again please?
7 Q: After Mr. Tallman's passing, how did the
8 design team create a line?
9 MR. GARRISON: Thank you.
10 A. We utilized sales reps to submit designs.
11 I created designs. We had -- I can think of one
12 specific freelance designer that contributed
13 designs.
14 Q. Could you name him or her for me?
15 A. Carolyn Clark.
16 Q. When you stated that you designed some of
17 the products in the line, how would you design
18 some of the products in the line?
19 MR. GARRISON: Object to the form of
20 the question.
21 A. I would design basically -- what we design

is, you know, original combination of elements. So it's a two-dimensional piece of art. It's a drawing on a piece of paper. So I would draw a sketch on a piece of paper.

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Q. When you say -- when you said original combination of elements, could you explain what that means?

A. Well, sure. I mean, design is simply an arrangement of one or more elements.

Q. Could you illustrate that with a cheerleading uniform, what would be the elements?

MR. GARRISON: Object to the form of the question.

A. The design is the entire combination of the elements that are placed on the uniform.

Q. What kind of elements?

A. Well, I mean, basic forms. They would be basic forms in themselves. It's the unique and original combination of those elements. So it could be lines, diagonals, V's, while in themselves are basic, but the combination and position and arrangement of those elements is what creates a design.

Q. So going back to when you started to create products for the line

MR. GARRISON: Object to the form of the question.

Q. do you recall what it is that you designed first?

Strike that.

So you would draw uniforms with design elements, is that correct?

MR. GARRISON: Object to the form.

A. Not necessarily. I would create drawings of designs that were sometimes placed on uniforms, sometimes placed on other things.

Q. How did you -- how would you come about with these designs that would be placed on the uniform?

A. How would I come about with them?

MR. GARRISON: Objection to the form.

A. Can you --

Q. Did you refer to any catalogs? Were there any specifications that Varsity had as to what kind of designs were required?

MR. GARRISON: Object to the form.

A. I think as a creative person and a designer, you always have ideas floating around in your head. And we are always looking for new ways to combine basic design elements to create an original design that can be used on a garment.

Q. And these original designs would then be entered into the catalog; is that correct?

MR. GARRISON: Object to the form.

Q. With your changing roles did your -- did the scope of your position change from coordinator to -- sorry, look at my notes -- director of design and then VP?

A. Well, as coordinator, my primary responsibility was to coordinate the teams to get the project done. When I became director, I assumed responsibility for the things that the teams were doing previously.

Q. And would that -- would it be correct to state that it would be -- you would be coordinating the teams, and when it changed to director of design, you became responsible for design for Varsity?

A. Yes.
Q. Could you walk me through the design process in -- for the design team in Varsity from conception to catalog?
A. Yes. Well, as you suggest, everything, of course, starts with a concept. As I mentioned before, you know, as designers there's always ideas floating around. And those are eventually transferred on paper in the form of a sketch. Then once we determine that that design on that sketch will be used on a garment in our line, we

will assign it a design number. Then we will create mechanical drawings depending on what type of garment the design will be used on, and they will be named accordingly.
So we will take a template for that garment type, so it's essentially a scaled down version of the pattern, and we will place that design on that template. And we will create folders in our Web PDM software, which is product development software. And we will move that to what we call the design stage. And at that point

is when a pattern maker will make a pattern, and
that pattern is then sent to our sample room where
any pattern pieces would be cut or component parts
will be gathered. And then the garment would be
sewn by the sample room.
Q. When you say "pattern," what does that
include?
A. Well, sometimes if we use the design on a
garment that will be a cut-and-sew garment, there
will be pieces that will be sewn together.
Q. What are -- are there specific names
for these pieces, any names or material for these
pieces?
A. Not that I'm aware of.

lines as you state, are they made of any specific
fabric?
MR. GARRISON: Object to the form.
A. Initially it's completely apart from the
uniform. I mean, initially that concept and
sketch it's not on a uniform. It's a drawing on a
piece of paper.

Q. And when you give it to the pattern maker, is it correct that the drawing is translated into some kind of material or clothing that can be then laid out and put on the uniform?

MR. GARRISON: Object to the form.

A. Can you state that again.

Q. Sure. Let me rephrase it. From our conversation there is the base uniform and there is this design element that is created on the computer. And then you said -- or stated that these design elements are placed on the base uniform; is that correct? Would you agree with me?

A. Yes. The design is placed on to the base uniform.

Q. When the design is placed on to the base uniform, how do -- how does it get attached to the uniform?

MR. GARRISON: Object to the form.

A. Well, it can get attached to the uniform in various ways.

Q. Could you list the ways?

A. It could be done -- it could be made into a cut-and-sew garment, or it could be sublimated

on to the garment, so infused into the fabric.
Q. Let's take cut and sewn to the garment.
How is that process carried out?
MR. GARRISON: Object to the form.
A. How is a pattern made? I mean, I'm not a pattern maker.
Q. So you have no idea how a pattern is made?
A. Well, I know that they take the design lines and put them on to the base pattern piece.
Q. So after you send your design to the pattern maker, you have no further input?
A. I have input once the prototypes are manufactured.
Q. *But sitting here you couldn't explain how the design is translated into a pattern?*
MR. GARRISON: Object to the form.
A. Not technically, no.
Q. You -- do you provide any other specifications to the pattern maker when you send

for, and it's to scale to my original sketch as well.
Q. So in your original sketch there is a scale that is provided for the design elements?

MR. GARRISON: Object to the form.

A. As far as overall look and appearance of the design on the garment, but when the mechanical drawing is created, as I've stated, that is a scaled-down version of an actual pattern. So when the design lines are placed on that, they will be placed to scale.

Q. And when you stated that there are several different ways that this pattern can be placed on a based uniform, you mentioned cut and sewn.

MR. GARRISON: Object to the form.

Q. Is that correct?

A. Can you state that again?

Q. Earlier in your testimony when you stated that there were several different methods in which a pattern is placed on the base uniform, you stated cut and sewn as one of the methods.

MR. GARRISON: Object to the form.

Q. Is that correct?

A. I think I stated there are different ways that the design can be placed on the uniform. It could be -- you know, the design -- the uniform

could actually be a cut-and-sew garment or it could be sublimated.

Q. Is the cut -- my question is directed to the cut-and-sew process. In the cut-and-sew process how is the pattern placed on the uniform?

MR. GARRISON: Object to the form.

A. Well, first of all, I don't understand what you mean by pattern placed on a uniform. A design is placed on the uniform and a pattern -- you know, the pattern is made to create the uniform. Like a design is placed on the pattern.

Q. How is the design placed on the uniform?

A. It could be cut and sewn or it could be sublimated.

Q. Could you explain what cut and sewn means?

A. There would be -- cut means pieces are cut out of presumably fabric, and sewn would mean they're sewn together.

Q. So would it be correct to state that the design is sewn onto the uniform?

MR. GARRISON: Object to the form.

A. Yes, the design is placed on the uniform.

Q. How does it attach to the uniform?

MR. GARRISON: Object to the form.

Q. Okay. And that's what happens in sublimation; is that correct?

A. Yes.

Q. What happens when it is sublimated?

A. The design is transferred into the fabric by what is called dye sublimation. It's by a heat-related process.

Q. What happens when the design is infused on to the base uniform?

A. The fabric

MR. GARRISON: Object to the form.

A. Through heat, the dye is sublimated into the fabric.

Q. So the design and fabric is one?

MR. GARRISON: Object to the form.

A. The design is basically printed on to the fabric.

THE VIDEOGRAPHER: Less than two minutes on the tape, please.

MS. NAGAMPALI: Let's take a break then.

MR. GARRISON: Okay.

THE VIDEOGRAPHER: Going off the

record. The time is 11:40.
(Brief recess.)

Q. Web PDM?
A. Uh-huh.
Q. And PDM is product development --
A. Management I believe.
Q. And this was introduced in 2005?
A. I believe it was 2005 or 2006 that we began using this process.
Q. What happened before the Web PDM management was introduced to the design department?
A. The sketch -- so the two-dimensional artwork was given to the pattern department.
Q. And what did the pattern department do with the sketch?
A. The pattern department would create a pattern placing the design that is on the sketch on to the base pattern.
Q. The sketch would contain what kind of elements of design?
A. The sketch is our illustration of an original combination of various types of design elements.

Q. Could you give me one example of a Varsity design which has various elements?
A. Some designs include V's and diagonals and

lines and curves.
Q. Isn't it true that V's and diagonals, lines and curves have -- were being used in cheerleading uniforms from the beginning?
A. Sure. The basic elements are basic elements. What we are protecting is our original combination of those elements, the original position and arrangement of those elements.
Q. Do these elements when you arrange them in a sketch, do you write any specifications or directions to the pattern maker?
A. Sometimes there are instructions given, but the basic instruction is I want the uniform once the design is placed on it to look like my drawing.
Q. Are there any instances where there is a problem with the design and the base uniform -- I'm sorry. Strike that.
Is there any problem with placing the design on the uniform?
MR. GARRISON: Object to the form.

A. If there is a problem putting the design on the uniform, the design goes away.
Q. So the base design is of a certain measurement?

A. Web PDM allows development to be more automated.
Q. Could you explain that to me.
A. Web PDM allows us to follow a style code through the entire development process and for us to maintain all information about a specific style in one location.
Q. So after a sketch is designed by the design department, what happens next?
MR. GARRISON: Asked and answered.
A. Once a sketch is on paper and we have determined that the design will move forward in our line, we will determine what types of products that design will be placed on. We will create mechanical drawings for each type of garment, placing the design on to that template. We will name those, create folders in our Web PDM software and -- which includes all the information about

that style, including the mechanical drawing. And
then we will send that to what we call the design
stage, and at that point the technical design
group will assign a pattern maker. The pattern
maker will create a pattern.
Q. Is the PDM software used by designers in
the industry?

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paper.
Q. And would you say there are -- these
lines and curves, are they in some kind of
computer program that you use -- designers use to
sketch or draw or is it always by paper?
MR. GARRISON: Object to the form.
A. All of our designers are designing on
paper.
Q. Do you keep -- retain copies of those
sketches?
A. I have copies of original sketches that
are selected for use as designs on garments that
are included in our lines.
Q. Where are these original sketches saved?
A. They're saved in notebooks.

Q. These notebooks are stored on Varsity's premises?
A. Yes.
Q. Who in Varsity supervises storage or filing, saving of these sketches?
A. I do.
Q. Do you -- strike that.
For how many years have you been saving sketches or notebooks with these sketches at Varsity?

by Varsity as part of their document production. It wasn't Bates stamped.
(Whereupon, a shell top sample was marked as Exhibit No. 11.)
Q. I'm going to hand you this, Ms. Williams. Do you recognize this -- do you recognize Exhibit 11?
A. Yes.
Q. Can you identify what Exhibit 11 is?
A. It is a garment bearing the 299 design.
Q. Were you involved in designing the 299 design?
A. No, I was not.
Q. Can you identify for the record who was

involved in designing the 299 design?
A. Kraig Tallman was the designer of the 299.
Q. Is there anyone else that you know who was involved in 299 design -- design -- I'm sorry. Do you know of any other individual at Varsity who was involved in the design of 299?
MR. GARRISON: Object to the form of the question.
A. I do not know of other individuals that would have been involved.
Q. Earlier in your testimony you had

EXHIBIT F
to Varsity's Statement of Undisputed Facts

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC., Plaintiffs, v. STAR ATHLETICA, L.L.C., Defendant.	)	No.: 2:10-cv-02508-RHC-cgc **FILED UNDER SEAL**

DECLARATION OF BRIAN CARROLL

I, Brian Carroll, declare as follows:

1. My name is Brian Carroll. I am the General Manager of the Varsity plaintiffs in the above-captioned case. I am over the age of 18 and have personal knowledge of the facts stated herein.

2. Varsity employs full time designers who work to create new and original designs to be used on Varsity's cheerleading apparel.

3. Collectively, the Varsity plaintiffs have obtained or acquired over 200 U.S. copyright

registrations for two-dimensional designs which have been reproduced on the surface of Varsity's cheerleading uniforms and other garments.

4. The copyright registrations are a matter of public record, and include, in addition to the registrations of the five designs we allege are infringed by the defendant, Registrations Nos. VA 204-290; VA 204-291; VA 204-292; VA 204-293; VA 204-294; VA 204-295; VA 204-296; VA 204-297; VA 204-298; VA 204-299; VA 204-300; VA 204-301; VA 204-302; VA 204-303; VA 204-304; VA 204-305; VA 204-306; VA 204-307; VA 204-308; VA 204-309; VA 204-310; VA 204-311; VA 204-312; VA 204-313; VA 204-314; VA 204-315; VA 204-316; VA 204-317; VA 204-318; VA 204-319; VA 204-320; VA 204-321; VA 204-322; VA 204-323; VA 204-324; VA 204-325; VA 204-326; VA 204-327; VA 204-328; VA 204-329; VA 204-330; VA 204-331; VA 204-332; VA 204-333; VA 204-334; VA 204-335; VA 204-336; VA 223-012; VA 223-013; VA 223-014; VA 223-015; VA 223-016; VA 223-017; VA 223-018; VA 223-019; VA 223-020; VA 223-021; VA 225-575; VA 225-576; VA 225-577; VA 225-578; VA 225-579; VA 225-580; VA 225-581; VA 225-582; VA 225-583; VA 225-584; VA 1-319-222; VA 1-319-223; VA 1-319-224; VA 1-319-225; VA 1-319-227; VA l-404-953; VA l-404-954; VA l-404-955; VA 1-404-956; VA 1-411-536; VA 1-411-626; VA 1-415-329; VA 1-428-450; VA 1-428-451; VA 1-428-452; VA 1-428-453; VA 1-428-454; VA 1-428-455; VA 1-428-456; VA 1-428-457; VA 1-428-458; VA 1-428-459; VA 1 428-460; VA 1-428-461; VA 1-428-462; VA 1-428-463; VA 1-428-464; VA 1-428-465; VA 1-428-466; VA 1-428-467; VA 1-428-468; VA 1-428-469; VA 1-428-470; VA 1-428-471; VA 1-428-692; VA 1-428-693; VA 1-428-694; VA 1-428-695; VA 1-428-696; VA 1-428-697;

VA 1-428-698; VA 1-428-699; VA l-428-700; VA 1-428-701; VA 1-428-702; VA 1-428-703; VA 1-428-704; VA 1-428-705; VA 1-428-706; VA 1-428-707; VA 1 653-799; VA 1-653-802; VA 1-653-804; VA 1-653-805; VA 1-653-807; VA 1-653-808; VA 1-653-810; VA 1-653-812; VA 1-653-814; VA 1-653-815; VA 1-653-816; VA 1-653-817; VA 1-653-819; VA 1-653-820; VA 1-667-030; VA 1-667-200; VAI-667-372; VA1-669-027; VA1-669-144; VAl-669-157; VA1-669-159; VAl-669-181; VA 1-669-182; VA 1-669-183; VA l-669-186; VA 1-669-315; VA 1-669-319; VA 1-669-356; VA 1-669-411; VA 1-669-657; VA 1-669-774; VA 1-669-993; VA 1-670-515; VA 1-672-935; VA 1-673-704; VA 1-673-707; VA 1-673-708; VA 1-675-058; VA l-675-059; VA 1-675-060; VA 1-675-061; VA 1-675-062; VA 1-675-063; VA 1-675-064; VA 1-675-065; VA 1-675-069; VA 1-675-071; VA 1-675-072; VA 1-675-073; VA 1-675-790; VA 1-675-834; VA 1-675-853; VA 1-675-871; VA 1-675-879; VA 1-675-883; VA 1-675-885; VA 1-675-888; VA 1-675-891; VA 1-675-896; VA 1-675-898; VA 1-675-899; VA 1-675-900; VA 1-675-901; VA 1-675-902; VA 1-675-903; VA 1-675-904; VA 1-676-953; VA 1-689-922; VA 1-694-242; VA 1-712-125; VA 1-712-126; VA 1-712-127; VA 1-712-128; VA 1-712-129; VA 1-712-130(Supplemental: VA 1-432-015); VA 1-712-131, VA 1-712-132; VA 1-712-133; VA 1-717-527; VA 1-720-317; VA 1-774-922; VA 1-774-924; and VA l-774-926. *See* Copyright Office online Public Catalog, http://cocatalog.loc.gov.

5. Fifty-one of these registrations were obtained after first receiving a refusal to register from the Copyright Office. I have attached as **Exhibit** A to this declaration true and correct copies of correspondence received from the Copyright Office dated October 19, 2007, October 20, 2008, and

February 19, 2009 allowing the registration, after an initial refusal to register, of Varsity's designs, namely design nos. WS0632FA, WMD0631FA, WS0629FA, WS0627RA, WS0625A, WS0624FA, WS0623A, WS0622RA, WS0617A, WS0051A, WS0516A, MFBL065W, MFBLR0643M, WS0629A, WS0819A, WS0618A, WS0613A, WH0613A, WS0610A, WS065FA, WH064A, WS060A, 0646, WS0612A, 067, WS068A, WH0614A, WS0516A, BB10, BB9, MFBL0515W, MFBL0642W, WS0640RA, WS0638A, WS0637A, WS0636A, WH0635A, WH0634A, 522, 059, 535, 017, 242, 057, 9213, 9314, 043, 0410, 538, 529, 801, and 0644, based on the Copyright Office's having found, as set forth in the Exhibit that after carefully reviewing each design, that there is a sufficient amount of original, creative and separable artistic or graphic authorship on the surface of each design to support a copyright registration. True and correct copies of the deposit materials which Varsity submitted to the Copyright Office for each of the designs listed above in this paragraph are attached to this declaration as **Exhibit B.**

6. Varsity has incorporated the designs at issue onto the surface of cheerleading uniforms in two different ways: by cutting and sewing and by sublimating. From 2005 to the present, Varsity has been offering sublimated cheerleading uniforms in its catalogs. Varsity's sales of sublimated cheerleading uniforms is a quickly growing portion of Varsity's uniform sales. For example, in 2011, Varsity had over $600,000 in revenue generated from the sales of sublimated cheerleading uniforms. In 2012, Varsity generated over $1,200,000 in sales

revenue from the sale of sublimated cheerleading uniforms which included over 20,000 units.

7. As Varsity's general manager, while sublimation technology has been available for a while in the apparel industry, I have noticed an increasing number of Varsity's competitors offering sublimated cheerleading uniforms. I believe the following companies are currently offering and selling sublimated cheerleading uniforms: Cheerleading.com, Alleson Athletics (Alleson.com), Rebel Athletics, Mee Sports, Team Leader, Extreme Bling Uniforms, The Cheerleading Source, and Cheerleading Company.

8. Kerry Leake is a former employee of Varsity. His employment terminated at the end of December 2009. During the entire time Kerry Leake was an employee of Varsity, he had access to all of Varsity's catalogs from at least 1998 up until the time of his departure from Varsity in December 2009.

9. Varsity distributes thousands of copies of its catalog each year to members of the cheerleading industry. Additionally, for each year since around 2001, Varsity has made available on its website an electronic copy of its catalog during each of those years which can be accessed by visiting Varsity's website.

I declare under penalty of perjury that the foregoing is true and correct.

s/_____

BRIAN CARROLL

Exhibit A

October 19, 2007

[Seal of the United States Copyright Office 1870]
LIBRARY OF CONGRESS
Washington D.C. 20559-6000

COWAN, LIEBOWITZ & LATMAN, PC
ATTN: THOMAS KJELLBERG
1133 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

Control No. 61-417-6927(K)
Re: WSO632FA; WMD0631FA; WSO629FA; WSO627RA; WSO625A; WSO624FA; WSO623A; WSO622RA; WSO617A; WSO051A; WSO516A; MFBL065W; MFBLR0643M; WSO629A; WS0819A; WSO618A; WSO613A; WHO613A; WSO610A; WSO65FA; WHO64A; WSO60A; 0646; WSO612A; 067; WSO68A; WHO614A; WSO516A; BB10; BB9; MFBL0515W; MFBL0642W; WSO640RA; WSO638A; WSO637A; WSO636A; WHO635A; and WHO634A

Dear Mr. Kjellberg:

This refers to your letter dated March 8, 2007, requesting reconsideration of our refusal to register a copyright claim in the above 38 works. You made this request on behalf of NSG Corporation.

We have carefully reviewed these works, articles of clothing, in light of the points raised in your letter. Upon further review, we have decided to register copyright claims in all 38 works because we believe that each work contains a sufficient, although mini-

mal, amount of original and creative artistic or graphic authorship in the treatment and arrangement of the pre-existing elements coupled with their coloring on the surface of each work that may be regarded as copyrightable and, therefore, support a copyright registration.

Our decision to register the design appearing on the surface of each work is based on the low standard for copyrightability articulated in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). The effective date of registration for each work is August 22, 2006, the date that we originally received the applications, deposit material, and filing fees.

The certificates of registration are being mailed separately and should arrive soon.

We hope that this resolves the matter satisfactorily for both you and your client.

Sincerely,
Virginia Giroux-Rollow
Attorney Advisor
Registration and Recordation Program
By: [Virginia Giroux-Rollow]

[SEAL OF THE UNITED STATES COPYRIGHT OFFICE 1870]

United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington DC 20559-6000
www.copyright.gov

October 20, 2008

Thomas Kjellberg
Cowan, Liebowitz & Latman, PC
1133 Avenue of the Americas
New York, NY 10036-6799
United States

Correspondence ID: 1-22P7C7

RE: see title list below

Dear Thomas Kjellberg:

We cannot register these works because they lack the authorship necessary to support a copyright claim.

Copyright protects original works of authorship that are fixed in some physical form. See 17 U.S.C.§102(a). As used in the copyright context, the term "original" means that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least a minimal degree of creativity. See *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

To satisfy these requirements, a work of the visual arts must contain a minimum amount of pictorial, graphic or sculptural authorship. Copyright

does not protect familiar symbols or designs; basic geometric shapes; words and short phrases such as names, titles, and slogans; or mere variations of typographic ornamentation, lettering or coloring. See 37 C.F.R.§202.1. Further, copyright does not extend to any idea, concept, system, or process which may be embodied in a work. 17 U.S.C. §102(b).

Neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright law. See *Bleistein v. Donaldson*, 188 U.S. 239 (1903); *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The question is whether there is sufficient creative authorship within the meaning of the copyright statute and settled case law.

After careful consideration, we have determined that these particular works will not support a claim to copyright under the standards described above. Therefore we cannot issue the registrations which you requested. The copyright law requires that we retain the deposits of these works. 17 U.S.C. §704(a). The nonrefundable filing fees have been applied to administrative costs.

For more information on copyright, please see the enclosed circulars, as well as our website located at www.copyright.gov.

Thomas Kjellberg

Enclosures:
Circulars 31, 96 Sec. 202.1
SL-4a (Reconsideration Procedure)

Title List: 522
059

535
017
242
057
9213
9314

[Seal] United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington DC 20559-6000
www.copyright.gov

1-22P7C7

Return this sheet if you request reconsideration.

How to request reconsideration:

- Send your request in writing. (It must be received in the Copyright Office not later than three months after the date on the Office's refusal letter.)
- Explain why the claim should be registered or why it was improperly refused.
- Enclose the required fee – see below.
- Address your request to:

  Copyright RAC Division
  P.O. Box 71380
  Washington, DC 20024-1380

Note: To expedite delivery, write "Reconsideration" on the outside of the envelope. Include the Correspondence ID Number (see above) on the first page. Indicate either "First Reconsideration" or "Second Reconsideration" as appropriate on the subject line.

Notification of decision: The Copyright Office will send a written notification of its decision, including an explanation of its reasoning.

First Request for Reconsideration: The Registration and Recordation Program Office considers the first request. If it upholds the refusal, you may submit a second request.

Second Request for Reconsideration: The Copyright Office Board of Review considers the second request. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees), and a third member appointed by the Register. The Board's decision constitutes final agency action.

FEES:

First Request $250
Additional claim in related group $25

Second Request $500
Additional claim in related group $25

February 19, 2009

[Seal of the United States Copyright Office 1870]

LIBRARY OF CONGRESS
Washington D.C. 20559-6000

COWAN, LIEBOWITZ & LATMAN, PC
ATTN: THOMAS KJELLBERG
1133 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-6799

Corresp. ID: 1-26RI9O
Re: 043; 0410; 538; 529; 801; and 0644

Dear Mr. Kjellberg:

This refers to your letter dated January 28, 2009, requesting reconsideration of our refusal to register a copyright claim in the above six works. You made this request on behalf of Varsity Brands, Inc.

We have carefully reviewed these works, articles of clothing, in light of the points raised in your letter Upon further review, we have decided to register a copyright claim in all six works because we believe that each work contains a sufficient, although minimal, amount of original and creative **separable** graphic authorship in the treatment and arrangement of the elements, coupled with their coloring, appearing on the surface of each work that may be regarded as copyrightable and, therefore, support a copyright registration.

Our decision to register these works is based on the low standard for copyrightability articulated in Feist Publications v. Rural Telephone Service Co., 499 U.S. 2 340 (1991). The effective date of registration for each work is August 19, 2008, the date that we originally received the applications, deposit mate-

rials and filing fees. The certificates of registration are being mailed separately and should arrive soon.

We hope that this resolves the matter satisfactorily for both you and your client.

Sincerely,
Virginia Giroux-Rollow
Attorney Advisor
Examining Division
By: [Virginia Giroux-Rollow]

Exhibit B

Design WS0632FA
Registration No. VA-1-428-451

Design WMD0631FA
Registration No. VA-1-428-452

Design WS0629FA
Registration No. VA-1-428-453

Design WS0627RA
Registration No. VA-1-428-454

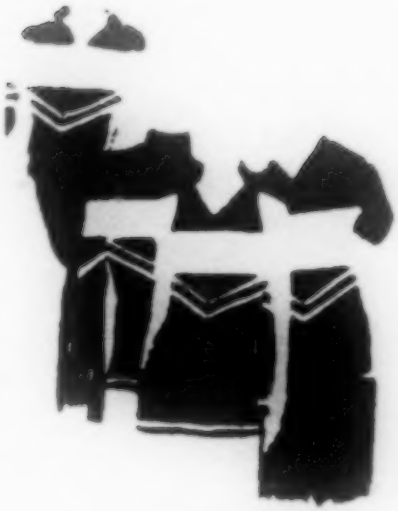
Design WS0625A
Registration No. VA-1-
428-455

Design WS0624FA
Registration No. VA-1-
428-456

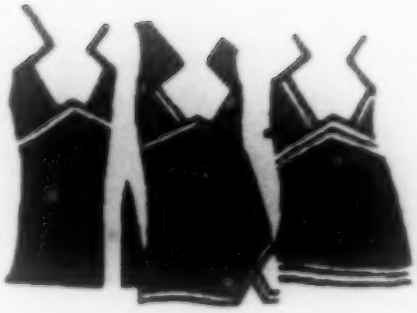
Design WS0623A
Registration No. VA-1-
428-457

Design WS0622RA
Registration No. VA-1-
428-458

Design WS0617A
Registration No. VA-1-
428-459



Design WS061A
Registration No. VA-1-
428-460



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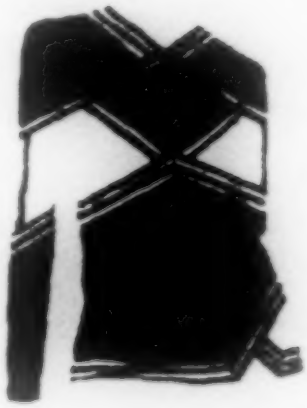
Registration No. VA-1-
428-696



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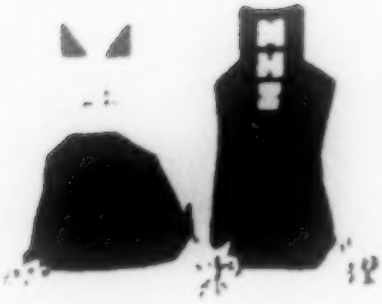
Registration No. VA-1-
428-461

Design MFBL0643M
Registration No. VA-1
428-462



Design WS0620A
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428-463

Design WS0619A
Registration No. VA-1-
428-464

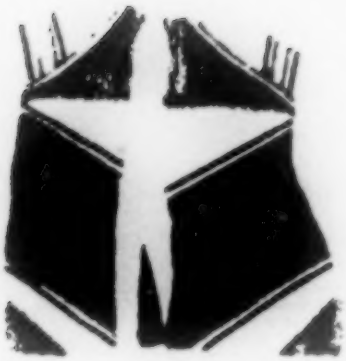
Design WS0618A
Registration No. VA-1-
428-465

Design WS0613-A
Registration No. VA-1-428-707

Design WH0613A
Registration No. VA-1-428-466

Design WS0610A
Registration No. VA-1-428-467

Design WS065FA
Registration No. 1-428-468



Design WH064A
Registration No. VA-1-
428-469

Design WS060A
Registration No. VA-1-
428-470

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Registration No. VA-1
428-471

Design WS0612A
Registration No. VA-1-
428-692

Design 067
Registration No. VA-1-
428-693

Design WS068A
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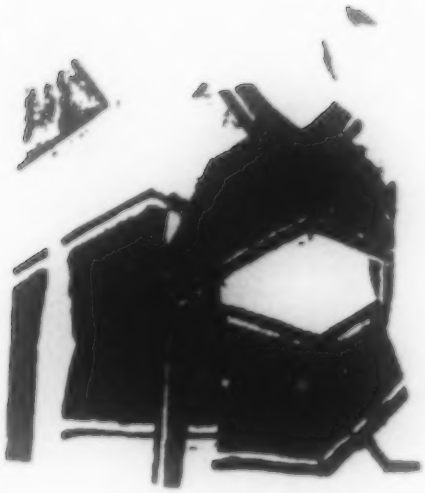
Design WH0614A
Registration No. VA-1-
428-695

Design BB10
Registration No. VA-1-
428-697



Design BB9
Registration No. VA-1-428-698

Design MFBL0515W
Registration No. VA-1-428-699

Design MFBL0642W
Registration No. VA-1-428-700

Design WS0640RA
Registration No. VA-1-428-701

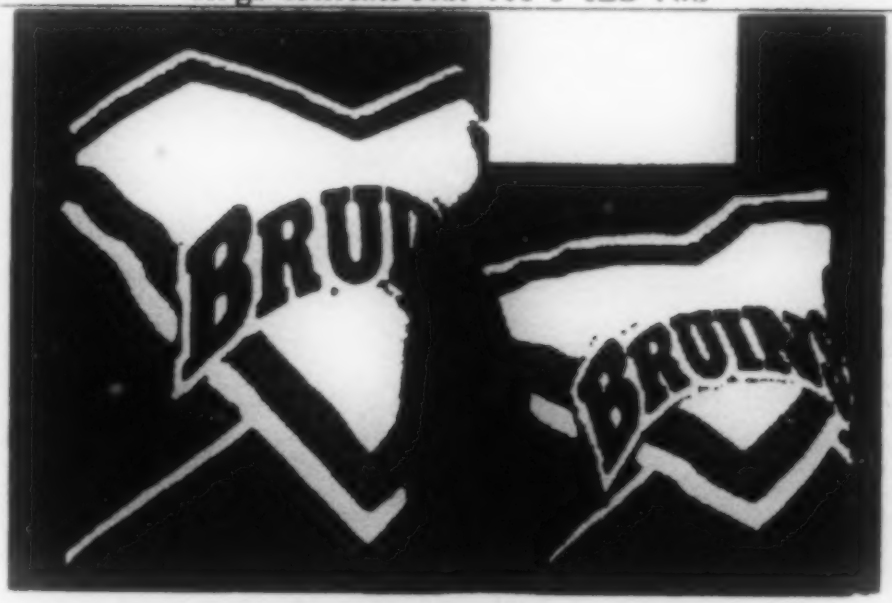
Design WS0638A
Registration No. VA-1-
428-702

Design WS0637A
Registration No. VA-1-
428-703

Design WS0636A
Registration No. VA-1
428-704

Design WH0635A
Registration No. VA-1-
428-706

Design WH0634A
Registration No. VA-1-428-705



Design 522
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Design 059
Registration No. VA-1-653-799

Design 535
Registration No. VA-1-653-802

Design 017
Registration No. VA-1
653-804

Design 242
Registration No. VA-1-
653-805

Design 057
Registration No. VA-1-
653-807

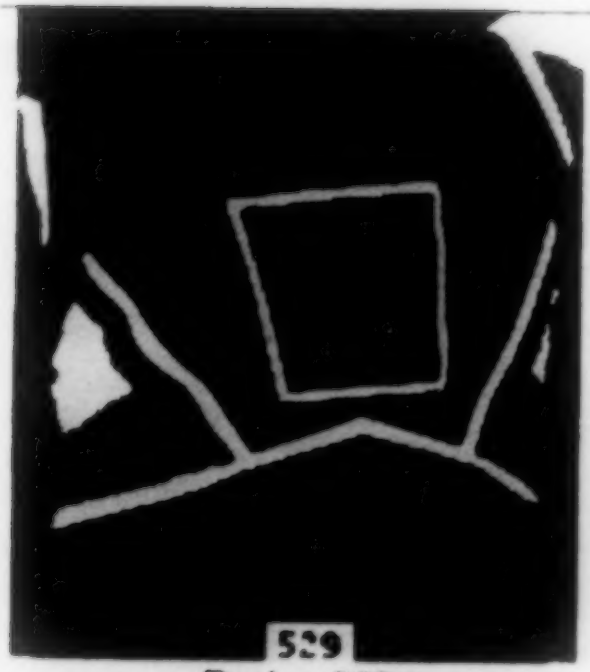
Design 9213
Registration No. VA-1-
653-808

Design 9314
Registration No. VA-1-
653-810

Design 043
Registration No. VA-1-
653-819

Design 0410
Registration No. VA-1-
653-817

Design 538
Registration No. VA-1-
653-816



Design 529
Registration No. VA-1-653-815

Design 801 VA-1-653-814
Registration No.

Design 0644
Registration No. VA-1-653-812

EXHIBIT G
to Varsity's Statement of Undisputed Facts

In The Matter Of:
Varsity Brands vs.
Star Athletica

Antonio Sarabia, II
September 20, 2012
Confidential

Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
901-523-8974

ALPHA REPORTING CORPORATION

Original File 6593CP TXT

protection in one of these things, what's my opinion? Or did you mean something else?

Q. No. I just wanted to know whether you had that opinion, and so you've answered that question.

A. Okay. Great.

Q. How about the second -- the first, which is the designs?

A. Right.

And what's the question again?

Q. Do you believe that these designs are not subject to copyright protection?

A. Well, there's a couple answers there, a couple points, excuse me, I should make.

MR. CROSBY: Object.

THE WITNESS: First of all, I'm not giving a legal conclusion about whether something can be copyrighted.

Second of all, there are a couple angles to look at that.

For example, I think under Varsity's right, it can prohibit this law firm from

reproducing those designs in two dimension and putting them on this wall. So I think that right is enforceable, and I have no problem with that. But that's not what's going on in this

EXHIBIT J
To Notice of Errata for Corrected Exhibits to Varsity's Statement of Undisputed Facts
[filed April 3, 2013]

In The Matter Of:
Varsity Brands vs.
Star Athletica

Kerry Leake
April 9, 2012

Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
901-523-8974

Original File 16145cc.TXT

* * * *

Q. Mr. Leake, your @starathletica.com e-mail address, you said you've had for about two years. How frequently do you think you use that e-mail address?

A. Almost every day

Q. What type of communications do you send every day through this e-mail address?

MR. CROSBY: Objection.

A. That would be general conversations, general e-mails, to various people, some of the independent reps for Star Athletica.

BY MR. BALDRIDGE:

Q. What do you communicate with independent reps for Star Athletica about?

A. They may ask questions about some of the – questions about some of the garments, a question about something in the catalog, Star Athletica catalogs or

pertaining to anything that may be in the catalog, in the
Star Athletica catalog.
MR. CROSBY: Anything related to these

conversations has to be marked confidential.
BY MR. BALDRIDGE:
Q. What else do you communicate with the independent
reps for Star Athletica about other than Star's catalogs?
A. That's Star's catalog, anything pertaining to
what they may need as far as their -- something that
they're selling.
Q. What would they need pertaining to what they're
selling?
A. Their product.
Q. They would need the product from you?
A. Well, if their -- anything that Star would be
making, Star Athletica would be making, would be
manufacturing.
Q. Why would they communicate with you about
something that Star Athletica is manufacturing?
MR. CROSBY: Objection.

A. I'm still -- may need some advice about it. They
may have some question about it, about how it's made or
something of that nature.
BY MR. BALDRIDGE:
Q. Why would you be the person to ask about how a
Star Athletica garment is made if you're not employed by
Star Athletica?
MR. CROSBY: Objection.

A. Because I still help Star Athletica. I'm not
employed by them, but I still help them.
BY MR. BALDRIDGE:
Q. How do you help them?
A. I will give them some advice at times and I help
them where they need help.
Q. You said that you would give them advice at
times. When you say, at times, you mean every day?
A. Could be, yes.
Q. And who is them? Who are you giving advice to?
A. Whoever may have asked, whether it's the

12 independent reps or whether it's the manufacturer.

13 Q. Do you know why an independent rep would ask you

14 a question about the manufacturing of a Star Athletica

15 garment instead of asking somebody that's employed by Star

16 Athletica?

17 A. Because they know that I'm helping and I would

18 have -- they just know that I'm able to help Star

19 Athletica in that area.

20 Q. When you say, in that area, what area are you

21 referring to?

22 A. In whatever area they need help in.

23 Q. Is that all areas of their business?

24 A. Any area that they need help, yes.

* * * *

Kerry Leake – April 9, 2012 156

13 Q. Mr. Leake, were you involved, at all, with Star

14 Athletica, in the creation of Star Athletica's 2010

15 catalog?

16 A. Yes, I was.

17 Q. What was your involvement?

18 A. I put together the Star Athletica catalog for

2010.

Q. When you say you put it together, break that down. What does that mean?

A. Well, I put the garments together and made the garments, had the garments made and get the photo shoots done.

Q. You oversaw the photo shoot?

A. I had.

Q. You oversaw the photo shoot for the 2010 catalog?

A. My wife and I, yes.

Q. How did you have the garments made?

A. They were made at the factory at Kimro.

Q. Who decided which designs to be made -- or sorry -- which garments to be made?

A. I did.

Q. What else did you do with regard to the 2010 catalog?

A. Basically. after the photos were made, then selected photos and chose the -- did the text for the photos.

Q. So you provided text for the 2010 catalog?

16 A. Text, yes, sir.

* * * *

Kerry Leake – April 9, 2012 164

21 Q. Did you have any catalogs with you, back home or

22 up there, wherever, that you relied upon to help you make

23 your patterns for the 2010 Star Athletica catalog?

24 A. I did some general research on the internet

25 before I started, but I didn't have anything up there, no.

Kerry Leake – April 9, 2012 165

1 Q. What was your general research on the internet?

2 A. Through various companies that was out there,

3 from the different competitors that were out there, GTM,

4 GK Elite, just to get the general appearance of what was

5 out there.

6 Yes. Did I look at Varsity's? Yes, you know, I

7 looked at Varsity's. But not to copy anything because I

8 wanted to make sure that what I had was -- there again,

was better -- to copy -- to get the general look of -- my
main thing was getting something, in general, to get out
to the public.
Q. Did you print out any print-outs from the
internet when you did your research on the internet?
A. No.

* * * *

Kerry Leake – April 9, 2012 166

Q. Have you ever done a sketch?
A. Very few sketches. I'm not a good sketch artist,
no.
Q. How long after your computer research did you go
to Kimro to make the patterns by hand?
A. I went that week.
Q. So the same week?
A. Yes.
Q. Was it within a matter of --
A. I spent a matter of just a couple of days.
Q. Couple of days?
A. Yes.
Q. Within two days?

14 A. Within a matter of two days.

* * * *

Kerry Leake – April 9, 2012 212

1 MARKED AS EXHIBIT NO. 21 TO THE DEPOSITION, AND IS

2 ATTACHED HERETO.)

3 BY MR. BALDRIDGE:

4 Q. It says, at the top -- looks to be an e-mail from

5 you, Kerry Leake, to Missy Mink. You see that?

6 A. Yes, I do.

7 Q. Who is Missy Mink?

8 A. She's a person that has done some selling from

9 St. Louis.

10 Q. When you say some selling from St. Louis – is

11 that what you said?

12 A. Yes. She's in St. Louis.

13 Q. Okay. And who does she sell for?

14 A. For Star Athletica.

15 Q. Is she a sales rep?

16 A. She's just an independent rep.

17 Q. Independent sales rep?

18 A. Yes.

19 Q. You state in your e-mail to her, Missy, we also

20 do dance. We can make anything in Varsity catalog. Do

you see that?

A. Yes.

Q. What did you mean when you said, we can make

anything in Varsity catalog?

A. We can make anything that looks like -- anything

Kerry Leake – April 9, 2012 213

that resembles what's in the Varsity catalog.

Q. When you say we, who are you referring to?

A. Star Athletica.

* * * *

EXHIBIT CC
To Star Athletica's Response to Varsity's Statement of Undisputed Facts
[filed May 7, 2013]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

VARSITY BRANDS, INC., VARSITY SPIRIT CORPORATION and VARSITY SPIRIT FASHIONS & SUPPLIES, INC.,	)	No. 10-cv-02508-STA-cgc
Plaintiffs,	)	
v.	)	
STAR ATHLETICA, L.L.C.,	)	
Defendant.	)	

DECLARATION OF JOSEPH D. LONG

Joseph D. Long, under penalty of perjury and pursuant to 28 U.S. C. § 1746, hereby declares and states as follows:

1. I am a principal in and the Creative Director of Black Barn Brand Design, a specialized design studio located at 737 Naples Avenue in Cayce, South Carolina 29033, and I have been employed with Black Barn Brand Design since June 2001. Black Barn Brand Design's clients include local, regional and national companies.

2. Prior to my employment with Black Barn Brands Design, I was employed from June 1998 to June 2001, with The Adams Group, a mid-sized (less than 50 employees) advertising agency, as the Art Director and Co-Creative Director.

3. Prior to working with The Adams Group, I was employed for more than ten (10) years as a professional cheerleader uniform designer, with National Spirit Group from March 1988 to December 1992 (designing uniforms for Teammates Spiritwear and Cheerleading & DanzTeam brands) and from January 1993 to June 1998, with Varsity in Memphis, Tennessee, in multiple capacity's, including Chief Designer (for Varsity's entire active wear line), Uniform Designer (for Varsity's cheerleading lines), Product Designer (for special events), Assistant Catalogue Director (for all catalogues).

4. I am submitting this Declaration to the Court in support of Star's motion for summary judgment and in opposition of Varsity's motion for summary judgment in this case.

5. I have more than 30 years of experience designing cheerleading uniforms, along with experience as a high school and collegiate cheerleader, professional cheer judge and instructor. My approach to designing uniforms has always been to design them with functionality to withstand the rigors of modern athletic cheerleading.

6. Among other things, during my tenure with Varsity, I sketched up an initial garment design concept drawing in pencil (produced as Long 0055) for the 299 design. Then, I submitted this initial drawing to my colleague and supervisor, the late

Kraig Tallman, for his consideration during an annual Varsity design meeting in 1998 (for designing the 1999 line) at his home in Memphis, TN. Following our usual process for designing garments for Varsity's line, Kraig then sketched up a human form in pencil (a.k.a., a croquis form) and I redrew the cheerleader uniform garment design style lines from my sketch, again, in pencil (superimposed over his sketch of the human form). He then inked over his pencil lines of the human form and my pencil lines of the 299 cheerleader uniform and then he added color using magic markers. The "299" cheerleader uniform design was subsequently made into a cut-and-sew cheerleader uniform and added to the 1999 Varsity line which was published in the 1999 catalog.

7 The 299 garment style that I developed (by combining previously existing competitor garment style lines) that Varsity added to its 1999 line, included a striped braid "y" motif at the sweetheart neckline and a striped braid at the double-point hemline. My inspiration for these garment design elements were (1) garment design sketches that I made in 1993 which included the double-point hemline (inspired by a Cheerleader Supply uniform) and (2) a "y" style line seam covered in braid just below the sweetheart-style neckline of a uniform appearing in the 1995 Elite catalog. A copy of my 299 garment design concept sketch (sketched between late 1997 to early 1998) is attached hereto as **Exhibit A**. A photocopy of the 1995 Elite cheerleader uniform catalog featuring the "y" and double-pointed style line elements is attached hereto as **Exhibit B.**

8. Attached hereto as **Exhibit C**, I prepared an illustration explaining the various parts of the "WS299ST" cheerleader uniform style, which counsel for Star informs me was provided to both Varsity and Magistrate Judge Claxton during the March 28, 2012 hearing to resolve the parties motions to compel. The picture of the WS299ST woman's shell-top style with the lettering "BRUINS" in Exhibit C is from page 76 of the 1999 Varsity Spirit Fashions catalog. As noted in **Exhibit C**, the "WS" prefix means "woman's shell," and "ST" refers to a stretchable fabric that was used in the back-panel of that uniform style.

9. As shown in **Exhibit C**, the primary components of my 299 woman's shell-top design are as follows:

a. The visible design elements are two solid-color front panels of cloth (##'s 4 and 5) which function to cover the front of the body and wick moisture away from the wearer; a color-separation style line seam to separate the gold and blue fabric panels (which are hidden under the striped braid forming a "y" motif where the "y" is shaped by mitring angles (i.e., cutting-and-sewing style lines to form the angles in the braid) into a length of braid that forms the "y"

b. The strips of knit striped braiding (##'s 6, 7, 8) protect and conceal the seams and hems of the two front panels which would otherwise be exposed to view, to the elements and to the rigors of cheering;

c. The color-matched threads hold together the strips of knit striped braiding and the two front panels;

d. The stretchable back panel (#3) provides a snug, yet flexible, fit which covers the back and wicks moisture away from the wearer;

e. The sweetheart neckline opening facilitates getting in and out of the shell top;

f. Bustline darts to tailor the uniform at the bustline for a trimmer fit;

g. Arm and waist holes allow the wearer to put on, wear and take off the garment;

h. The Varsity brand label identifies the source of the garment;

1. The lettering ("BRUINS") identifies the name of the team.

j. The strips of knit striped braiding around the neck and waist openings serve as style lines and also minimize the stretching of these neck and waist openings and strengthen the neck hem and waist hem and the hem stitching (hidden under the braid). In addition to these stabilizing features, these strips of knit striped braiding also function to conceal the hidden neck and waist hems and stitching that are on the exterior of the two front panels. Locating fabric edges and hems on the outside of the allows for and edge-free gold-blue style line joining the panels on the inside of the shell top, as well as, "hem-free" neck and waist lines on the inside of the shell

top, resulting in a more comfortable wearing experience.

10. All of the cheerleading uniform design elements of the 299 design that I submitted to Kraig Tallman in 1998, which Varsity markets and sells as its 299A and 299B designs, are consistent with my approach to designing high quality cheerleader uniforms that can withstand the rigors of modern athletic cheerleading.

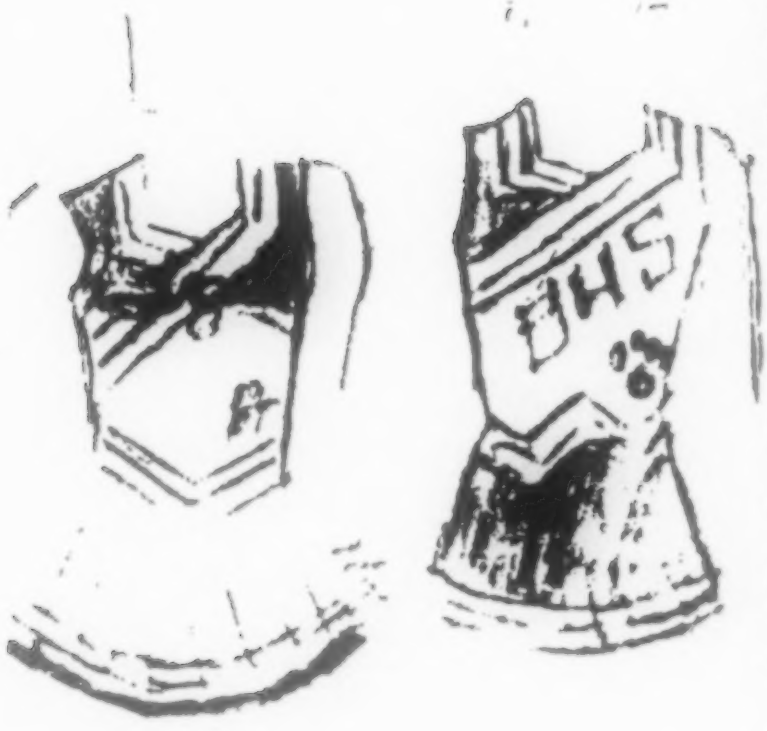
11. I never intended to use my 299 garment design concept sketch as a fabric design artwork. The details in **Exhibit C** show precisely what I had in mind, designing a cut-and-sew cheerleader uniform garment. But, screen printing, embroidering or sublimating the elements depicted in my sketch was never contemplated at any time when I designed the 299 cheerleader uniform style. It just wasn't what Kraig and I did when designing cheerleader uniforms for Varsity

12. What I designed was a high quality, functional cut-and-sew garment, with functional form fitting style line seams that facilitated the customer's detailing or assigning school colors to each of the panels that are separated by the style line seams (under the striped braid trim) and for all of the pieces of the seam-covering striped braid itself. What I had in mind was designing a customer-color-customizable cut-and-sew garment style that would be all their own so they could be the center of attraction, a team that showcases their school spirit, and the pride and joy of their families, school and community.

Dated: May 6th, 2013

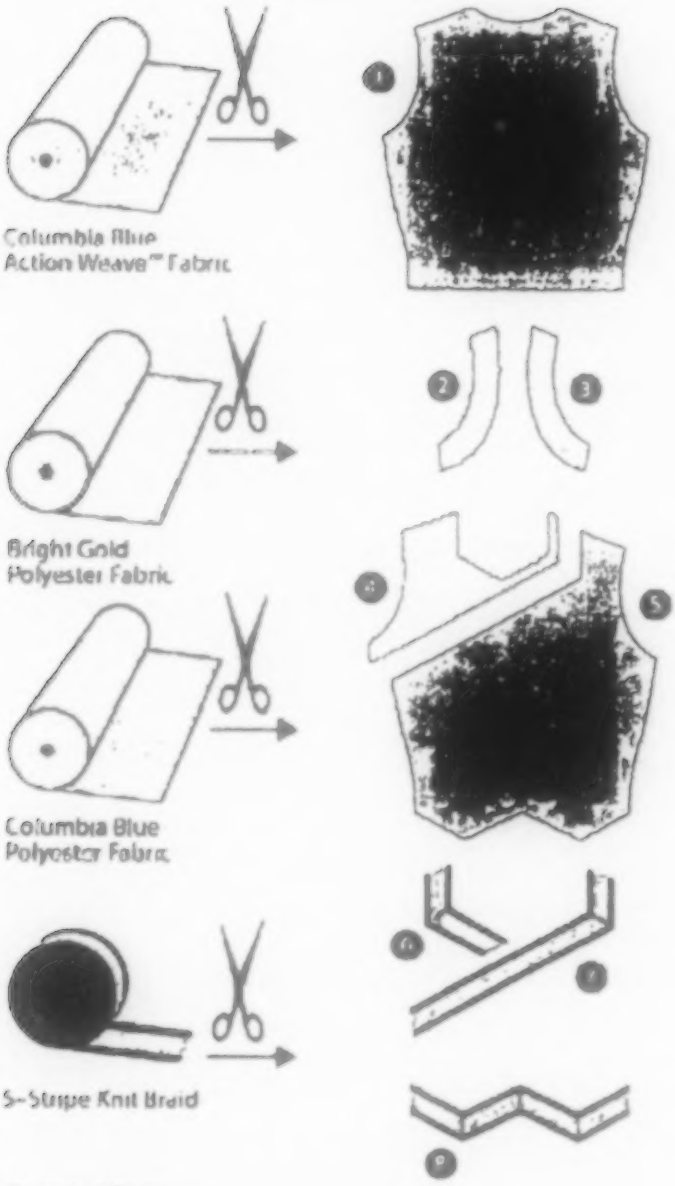
[Joseph D. Long]
JOSEPH D. LONG

Exhibit A



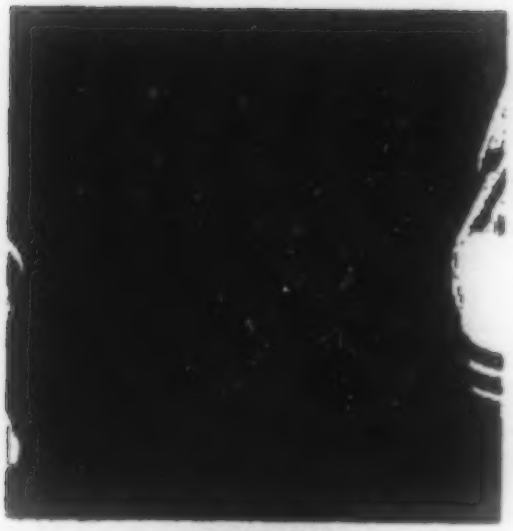
HIGHLY CONFIDENTIAL

Exhibit C

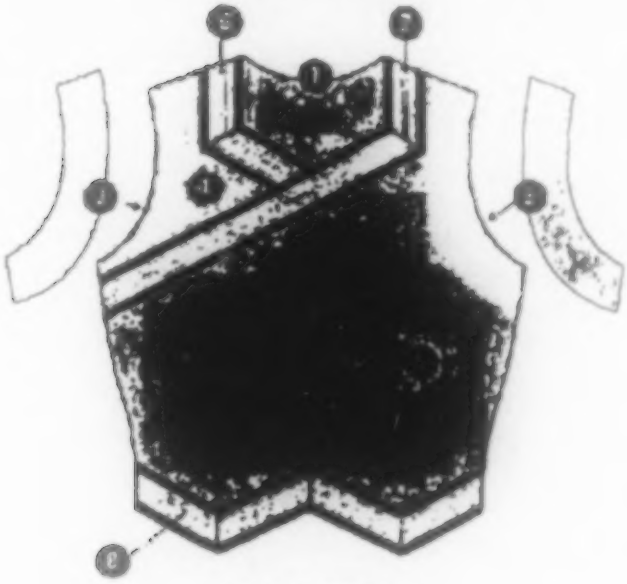


Garment Parts

1 Stretch Action Weave™ back panel
2,3 Arm hole facings *(sewn to the INSIDE of front panels)*
4: Upper front panel
5: Lower front panel
6, 7, 8: Striped braiding *(folded and stitched to form mitres that match the angles of the seams and hems underneath)*



WS-299ST
Varsity '99 Catalog



STYLE CODE

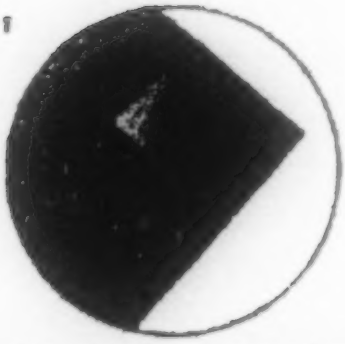
WS - **299** **ST**

Women's Shell

Stretch Action Weave™ Back Panel

Style Reference

Detail: 1

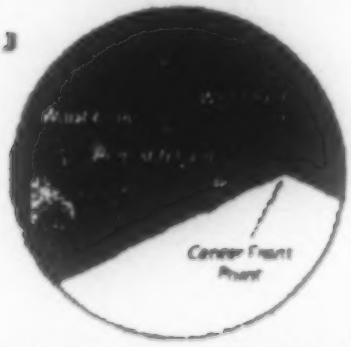


The outside of the front panels are stitched together to form a seam (see detail 2) with exposed edges folded away from the body for a smooth inside surface and a more comfortable fit.

Detail: 2

The edges of these front panel seams are then pressed open to the outside and striped braiding is centered over the seams *(to protect and hide the seam and edges)* and mitred where necessary *(to follow the angle of the seam)*.

Detail: 3



The neck and waist hems are folded away from the body and stitched to the panels. Then braiding is sewn to the edge of the neck and waist openings to conceal and protect the hems.

EXHIBIT C
To Plaintiffs' Opposition to Defendant's Objection to Varsity's Submission of Sublimated Materials
[filed July 12, 2013]

In The Matter Of:
Varsity Brands vs.
Star Athletica

Brian Carroll
April 23, 2012

Alpha Reporting Corporation
236 Adams Avenue
Memphis, TN 38103
901-523-8974

Original File 17720ln.TXT

* * * *

Q. Could you explain why sublimation was adopted by Varsity?
A. It's a new innovative technology that Varsity elected to use.
Q. And what was the basis for selecting this new innovation -- new innovative technology?
A. I don't know.
Q. Who would know?
A. Kim Williams.
Q. Were you ever consulted in the decision to select sublimation for Varsity?
A. Yes.
Q. Who consulted you?
A. Kim Williams.
Q. And what was the substance of the discussion?
A. Should we go to market with sublimated product.
Q. And what was your response?
A. Yes.
Q. What was your basis for your response?
A. We want to be new and innovative with our product lines.

24 Q. Did you do any research or review any
25 materials about sublimation before you made that

1 decision?
2 A. I did not.
3 Q. Did anyone review materials or do research
4 on sublimation for you before you made that
5 decision?
6 A. For the company.
7 Q. Do you know who reviewed those materials
8 for you?
9 A. Yes.
10 Q. Could you state the name of the person?
11 A. Kim Williams.
12 Q. Is there any economic benefit for Varsity
13 to use sublimation for its products?
14 MR. TRAMMELL: Object to the form.
15 A. Define economic.
16 Q. Saving costs, production costs, or
17 increase in revenue that could be directly
18 attributed to sublimation.
19 A. Yes.
20 Q. And what was your understanding of the
21 direct economic result or direct economic benefit

that could be attributed to sublimation?
A. Increased sales.
Q. Could you state how sublimation would
increase sales for Varsity?

A. Would be a new product sold.
Q. Do you know how many of Varsity's products
are being sublimated at this point in time?
A. I do not.
Q. And who would know that -- whether – how
many of Varsity's products are being sublimated?
A. Kim Williams, Gary Spencer, Tracy Hill,
Ronnie Gilmer.
Q. Mr. Carroll, I am once again going to
direct your attention to Exhibit 1, and it is
under the same numerical heading 1 -- I'm sorry,
it's actually under numerical heading 2 where you
will see it says, "nature of authorship," and it
says, "two-dimensional artwork."
MR. TRAMMELL: Do you see that?
A. I do not see that.
Q. I'm going to just point to --
A. Okay.
Q. Do you know of any knowledge as to why it

says, "two-dimensional artwork" there and "fabric

design (artwork)" under numerical heading 1?

MR. TRAMMELL: Object to the form.

A. No.

* * * *